COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)

1. THE COMMONWEALTH ASSOCIATION

(1) TERMINOLOGY AND CLASSIFICATION

(i) Terminology

701. 'The Commonwealth'.

The term 'the Commonwealth'[1] ordinarily signifies, first, the voluntary association of independent sovereign states which are recognised by each other as associated for purposes of consultation and co-operation, and which recognise the Queen[2] as the symbol of their free association and as such the Head of the Commonwealth[3]; and secondly, the whole of the territories and dependencies[4] of the states thus associated as members of the Commonwealth.

The term 'member of the Commonwealth' corresponds to the first sense of 'the Commonwealth' and signifies any of the independent republics, independent realms within Her Majesty's dominions[5], independent monarchies outside Her Majesty's dominions, or other independent and sovereign states which are recognised by each other as being members[6] of the Commonwealth.

Corresponding to the second sense of 'the Commonwealth' are the phrases 'within the Commonwealth'[7] and 'part of the Commonwealth'[8], which are ordinarily applicable to any territory for which the government of any member of the Commonwealth is responsible, including thus not only the territories and countries of the members themselves, but also their overseas or other dependencies or dependent territories[9].

The term 'Commonwealth' may be used adjectivally in either of the two principal senses indicated above, and is to be interpreted according to its context[10]. A country's inclusion in a statutory list of Commonwealth countries, or of independent Commonwealth countries, does not imply that it is in fact a member; such inclusion is not in law affected by the cessation of that country's membership[11].

1 Practically synonymous with 'Commonwealth', particularly in its first sense, are the terms 'Commonwealth of Nations', 'British Commonwealth of Nations' (see eg the Visiting Forces (British Commonwealth) Act 1933 s 8(1)) and 'British Commonwealth', though the two last-mentioned terms are obsolete.

2 As to the Crown in the Commonwealth see PARA 713 et seq.

3 For this definition of the Commonwealth association see the communiqués of the Commonwealth Prime Ministers' Meetings dated 27 April 1949 and 11 September 1962 (see Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) p 91) and 22 January 1971 ('Declaration of Commonwealth Principles'). As to the status of Head of the Commonwealth see PARA 713 text and note 2.

4 As to the meaning of 'dependency' see PARA 706. Territories formerly known as dependent territories of the United Kingdom are now known as 'British overseas territories': see PARA 702. As to dependencies of members outside Her Majesty's dominions see note 9.

5 As to the meaning of 'Her Majesty's dominions' see PARA 707. As to the international status of those independent members of the Commonwealth which are within Her Majesty's dominions see PARA 710.

6 Membership is sometimes signified by 'fully responsible status within the Commonwealth': see eg the Barbados Independence Act 1966, long title. See also the Interpretation Act 1978 s 5, Sch 1 sv 'colony' (the term does not include countries which, though part of Her Majesty's dominions, have fully responsible status within the Commonwealth); and PARA 705. As to the members of the Commonwealth see PARA 709.

7 See eg the Consular Relations Act 1968 s 12 (substituted by the Diplomatic and other Privileges Act 1971 Schedule) ('country within the Commonwealth'). Sometimes, however, the phrase is used to indicate a state's membership of the association: eg 'republic within the Commonwealth' (Trinidad and Tobago Republic Act 1976, long title).

8 See eg the Visiting Forces (British Commonwealth) Act 1933 s 4(2(i) ('part of the Commonwealth').

9 As to the meaning of 'dependency' or 'dependent territory' see PARA 706. Cf the Air Navigation Order 2005, SI 2005/1970 (in which 'the Commonwealth' means the United Kingdom, the Channel Islands, the Isle of Man, the countries mentioned in the British Nationality Act 1981 Sch 3 (countries whose citizens are Commonwealth citizens: see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11) and all other territories forming part of Her Majesty's dominions or in which Her Majesty has jurisdiction: Air Navigation Order 2005, SI 2005/1970, art 155(1); and see arts 3(1), 4(3), 130, 149(1).

10 Thus 'Commonwealth country' sometimes signifies only members of the Commonwealth and sometimes includes also British overseas territories (as in the Films Act 1985 Sch 1 para 1(1) as originally enacted) and the dependent territories of any other member. 'Commonwealth force' is given a definition, confining it to forces of members of the Commonwealth, in the Armed Forces Act 2006 s 374. 'Commonwealth force' is also defined, by reference to the Visiting Forces Act 1952 s 1, in the Immigration Act 1971 s 8(4)(b), (6).

11 See *Madzimbamuto v Lardner-Burke and George* [1969] 1 AC 645 at 722, [1968] 3 All ER 561 at 573, PC. A country may remain on all or any of such lists after it has left the Commonwealth, as Zimbabwe (see PARA 734) has remained: see *R v Governor of Brixton Prison, ex p Kahan*[1989] QB 716, [1989] 2 All ER 368, DC.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(1) TERMINOLOGY AND CLASSIFICATION/(i) Terminology/702. 'British overseas territory'.

702. 'British overseas territory'.

Territories formerly known as dependent territories of the United Kingdom are now known as 'British overseas territories'[1]. Together with the United Kingdom they form one undivided realm[2], though they are not parts of the United Kingdom and their governments and law are distinct from those of the United Kingdom.

1 British Overseas Territories Act 2002 s 1(1). The term is defined in the Interpretation Act 1978 Sch 1 (amended for these purposes by the British Overseas Territories Act 2002 s 1(3)) as having the same meaning as in the British Nationality Act 1981, which by s 50(1) (amended for these purposes by the British Overseas Territories Act 2002 s 1(1)(a)) defines it as meaning the territories listed in the British Nationality Act 1981 Sch 6; these are the 14 territories listed in PARAS 853-866.

2 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [40], [47], [2008] 4 All ER 1055 at [40], [47], [2008] 3 WLR 955 at [40], [47], [2008] 5 LRC 769 at [40], [47]; see also *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [106], [2009] 2 WLR 1205 at [106], [2008] All ER (D) 32 (Dec); and PARA 717.

UPDATE

702 'British overseas territory'

NOTE 2--*Bancoult*, cited, [2009] 1 AC 453; *Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

703. 'British possession'.

In statutes passed after 1889[1], the expression 'British possession' means, unless the contrary intention appears, any part of Her Majesty's dominions except the United Kingdom[2]; where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are to be deemed to be one British possession[3].

1 See the Interpretation Act 1978 Sch 1, Sch 2 Pt I para 4(1)(a) (amended by the Family Law Reform Act 1987 Sch 2 para 74, Sch 3 para 1, Sch 4). In the Colonial Prisoners Removal Act 1884, the term excludes the Isle of Man and the Channel Islands as well as the United Kingdom: see s 18.

2 'United Kingdom' in Acts and public documents passed or issued after 12 April 1927 means Great Britain and Northern Ireland unless the context otherwise requires: Interpretation Act 1978 Sch 1; Royal and Parliamentary Titles Act 1927 s 2(2) (amended by the Interpretation Act 1978 Sch 3). 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 Sch 2 para 5(a). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

3 Interpretation Act 1978 Sch 1. In certain Acts the term may include both the parts under the central legislature and those under the local legislatures: see eg the Evidence (Colonial Statutes) Act 1907 s 1(3); and the Colonial Probates Act 1892 s 4(3).

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(1) TERMINOLOGY AND CLASSIFICATION/(i) Terminology/704. 'British settlement'.

704. 'British settlement'.

In its technical sense, 'British settlement' denotes a British possession, not acquired by conquest or cession[1], which is not for the time being within the jurisdiction of the legislature of any British possession other than a legislature constituted in accordance with the British Settlements Acts 1887 and 1945[2].

1 As to acquisition by conquest and by cession see PARA 803.

2 British Settlements Act 1887 s 6. The purpose of this Act, and of 6 & 7 Vict c 13 (Settlements on Coast of Africa and Falkland Islands) (1843) and the West Coast of Africa and Falkland Islands Act 1860, which it repealed, was to authorise the Crown to set up a non-representative legislature in a settled colony: see *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 294-295, [1964] 3 All ER 377 at 381, CA. As to the meaning of 'settled colony' see PARAS 801-802.

705. 'Colony'.

In statutes and other legal provisions and documents, the term 'colony' can be and is given either a limited or an extended meaning, according to context and purpose[1].

In statutes passed after 1978, 'colony' means (unless the contrary intention appears) any part of Her Majesty's dominions outside the British Islands[2] except: (1) countries having fully responsible status within the Commonwealth; (2) territories for whose external relations a country other than the United Kingdom is responsible; or (3) any associated state[3], and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed (for the purpose of this definition) to be one colony[4].

That definition also applies[5] (unless a contrary intention appears) to statutes passed after 1889 but before 1979. In this application it includes any colony within the meaning of the Interpretation Act 1889[6] which was excluded, but in relation only to statutes passed at a later time, by any enactment repealed by the Interpretation Act 1978[7], and any country or territory which ceased after that time to be part of Her Majesty's dominions but subject to a provision for the continuation of existing law as if it had not so ceased[8]; moreover, in this application, head (2) above does not apply[9].

A colony with representative government is one that has a legislative body of which one-half or more are elected by inhabitants of the colony[10]. A colony with responsible government is ordinarily to be taken to be one in which, the legislature being wholly or mainly elected, the departments of government are directed by ministers individually and collectively responsible to the legislature; but the term 'responsible government' has no determinate legal meaning.

The term 'Crown colony' is not a legal term of art; sometimes it has been used to mean a colony in which the Crown's prerogative authority is unimpaired, sometimes a colony without responsible government, sometimes a colony without representative government, and sometimes[11] to distinguish territory within Her Majesty's dominions from a protectorate (especially when contiguous and jointly subject to the same administration).

1 See *Re Van Lessen, National Provincial Bank Ltd v Beamont* [1955] 3 All ER 691 at 693, [1955] 1 WLR 1326 at 1327. Statutory definitions and uses vary widely. In the Visiting Forces (British Commonwealth) Act 1933 s 5(3), 'colony' includes any British protectorate. Sometimes the Channel Islands and the Isle of Man are included in references to the United Kingdom in some provisions of an Act but are included in references to colonies in other provisions of the same Act: see eg the Naval Discipline Act 1957 s 125(2) (amended by the Armed Forces Act 2001 Sch 7 Pt 4; prospectively repealed by the Armed Forces Act 2006 Sch 17, with effect from 31 October 2009, but continued in force until 8 November 2009 by SI 2008/1780); and **ARMED FORCES** vol 2(2) (Reissue) PARA 20. As to British protectorates see PARA 708.

2 The British Islands are the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act 1978 Sch 1. So far as the definition applies to the interpretation of any statute passed after 1889 but before the establishment of the Irish Free State (ie 6 December 1922: see the Proclamation dated 6 December 1922, SR & O 1922/1353), the expression 'British Islands' includes the Republic of Ireland: Interpretation Act 1978 Sch 2 Pt I para 4(2).

3 A territory listed in the West Indies Act 1967 s 1 (repealed) was known as an associated state until its status of association with the United Kingdom was terminated. The territories so listed were Antigua, Dominica, Grenada, St Lucia, St Vincent, and St Christopher, Nevis and Anguilla: s 1(2) (repealed). As to the various dates on which these territories became associated states see note 7.

4 Interpretation Act 1978 Sch 1.

5 Interpretation Act 1978 Sch 1, Sch 2 Pt I para 4(1)(a).

6 Ie within the meaning of the Interpretation Act 1889 s 18(3) (repealed): namely, any part of Her Majesty's dominions except the British Islands (see note 2) and British India; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed (for the purpose of this definition) to be one colony. British India included the whole of India except the princely states (see the Interpretation Act 1889 s 18A(1) (repealed); and the Government of India (Adaptation of Acts of Parliament) Order 1937, SR & O 1937/230, art 2, Schedule Pt I); it formed part of Her Majesty's dominions, and was a British possession, until partitioned between India and Pakistan by the Indian Independence Act 1947 s 2(1) (repealed). References to British India are to be construed as references to India and Pakistan taken together or separately as circumstances and subject matter may require: s 18(1).

7 The countries so excluded, and the dates on which the relevant provisions repealed by the Interpretation Act 1978 Sch 3 took effect, are: Canada and its provinces, 11 December 1931; the Commonwealth of Australia and the Australian states, 11 December 1931; New Zealand, 11 December 1931; South Africa, 11 December 1931; the Irish Free State, 11 December 1931 (but see note 2); Newfoundland, 11 December 1931; Ceylon, 4 February 1948; Ghana, 6 March 1957; Nigeria, 1 October 1960; Sierra Leone, 27 April 1961; Tanganyika, 9 December 1961; Jamaica, 6 August 1962; Trinidad and Tobago, 31 August 1962; Uganda, 9 October 1963; Kenya, 12 December 1963; Malta, 21 September 1964; The Gambia, 18 February 1965; Guyana, 26 May 1966; Barbados, 30 November 1966; Mauritius, 12 March 1968; Fiji, 10 October 1970; The Bahamas, 10 July 1973; Tuvalu, 1 October 1978. To these must be added the countries which as associated states of the West Indies were so excluded as from various dates between 27 February 1967 and 27 October 1969: see the West Indies Act 1967 (Appointed Day) Order 1967, SI 1967/222 (appointing 27 February 1967 in relation to Antigua and to St Christopher, Nevis and Anguilla, 1 March 1967 in relation to Dominica and to St Lucia, and 3 March 1967 in relation to Grenada); and the West Indies Act 1967 (Appointed Day) Order 1969, SI 1969/1499 (appointing 27 October 1969 in relation to St Vincent). Papua New Guinea is declared never to have been a colony within the meaning of the British Nationality Act 1948 (repealed): Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act 1980 s 1(2).

8 See PARA 707 text and note 8; and PARA 721.

9 For earlier definitions see the Evidence Act 1851 s 19 (amended by the Statute Law Revision Act 1892) (which includes the Channel Islands and Isle of Man); and the Colonial Laws Validity Act 1865 s 1 (amended by the Burma Independence Act 1947 Sch 2; and the Statute Law (Repeals) Act 1976) (which excludes them).

10 See the Colonial Laws Validity Act 1865 s 1; and see also the Colonial Courts of Admiralty Act 1890 s 15.

11 See eg *Buck v A-G* [1965] Ch 745, [1965] 1 All ER 882, CA.

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706. 'Dependency'; 'dependent territory'.

'Crown dependencies' is a term often used, without formal legal meaning, to refer to the Channel Islands and Isle of Man[1], which are not 'British overseas territories'[2]. But 'dependency' and 'dependent territory' are terms that have frequently been used, again without any general technical meaning, to refer to a country, province or territory which, at least in respect of the conduct of its external affairs[3], is subject to the control of the government of a state or country of which it is not a part; it thus applies to all or any of the territories now designated as, respectively, Crown dependencies or British overseas territories[4].

1 See PARAS 790, 799. 'British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act 1978 Sch 1. See also PARA 705 note 2. As to the meaning of 'United Kingdom' see PARA 703 note 2.

2 See *Ex p Brown* (1864) 5 B & S 280; and PARA 799 note 4. See also the British Nationality Act 1981 Sch 6 (amended by the Overseas Territories Act 2002 s 1(1)).

3 Thus Canada (as a whole but not as to its component parts or provinces) can be regarded as having been a British dependency in 1908 or 1912 (*Re Rider's Will Trusts, Nelson v Rider* [1958] 3 All ER 135, [1958] 1 WLR 974; *Re Maryon-Wilson's Estate* [1912] 1 Ch 55, CA), but not in 1936 (*Re Brassey's Settlement, Barclays Bank Ltd v Brassey* [1955] 1 All ER 577, [1955] 1 WLR 192).

4 See also the special definition of 'dependency' for the purposes of the Explosive Substances Act 1883 s 3(1), provided for by s 3(2) (substituted by the Criminal Jurisdiction Act 1975 s 7(1)) (see **EXPLOSIVES** vol 17(2) (Reissue) PARA 1023).

707. 'Her Majesty's dominions'.

The term 'Her Majesty's dominions' signifies the independent or dependent territories under the sovereignty of the Crown[1]. When there were protectorates and protected states[2], they were not within the meaning of the term save by virtue of rare, special statutory definition. But, like the terms 'sovereignty' and 'territorial sovereignty', 'dominion' can be used to denote de facto unlimited[3] authority, in which sense the Crown could have sovereignty or dominion over territory outside Her Majesty's dominions[4]. But 'sovereignty' or 'territorial sovereignty' are terms more strictly and properly used to denote the Crown's power and jurisdiction over Her Majesty's dominions, these dominions belonging to[5] or being within the ownership of [6] the Crown directly or indirectly in right of the United Kingdom[7].

In general, when a country ceases to be within Her Majesty's dominions while remaining within the Commonwealth, it is usual to provide that references to Her Majesty's dominions contained in enactments passed before that country ceased to be within Her Majesty's dominions are still to be construed as including it; the effect of such provisions is that, until other legislative provision is made, the country in question, and any person or thing connected with it, is to be treated (for purposes of the law of the United Kingdom) as if it were still part of Her Majesty's dominions or otherwise had the same status within the Commonwealth as before the actual change in its status[8].

A declaration[9] made on behalf of the Crown that an area is or is not part of Her Majesty's dominions is accepted by the English courts as conclusive[10], though not of the legal consequences flowing from this characterisation of the area[11].

The term 'Her Majesty's dominions' is not to be confused with the obsolete term 'Dominion' which was in official and statutory use[12], during the first 50 years of the twentieth century, to denote self-governing members of the Empire or Commonwealth[13].

1 Correspondingly, 'Her Majesty's government' is a term which may be applied to the government of any independent member of the Commonwealth in which Her Majesty is sovereign, though it is often used to signify only the government of the United Kingdom. As to the position of the Queen in Her Majesty's dominions see PARA 714; as to the unity and divisibility of the Crown see PARA 717 et seq; and as to the countries within Her Majesty's dominions see PARA 709.

2 As to the meanings of 'protectorate' and 'protected state' see PARA 708.

3 See *Sabally and N'Jie v A-G* [1965] 1 QB 273, [1964] 3 All ER 377, CA; *Nyali Ltd v A-G* [1956] 1 QB 1, [1955] 1 All ER 646, CA; *Sobhuza II v Miller* [1926] AC 518, PC.

4 See *Ex p Mwenya* [1960] 1 QB 241 at 300, [1959] 3 All ER 525 at 534-535, CA, per Lord Evershed MR, and at 304 and 537 per Romer LJ; and see PARA 813.

5 Cf the Government of India Act 1935 s 311(1) (repealed).

6 Cf *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576 at 620, CA, per Kennedy LJ; and see PARA 813.

7 See PARAS 714-716, 790.

8 See eg the India (Consequential Provision) Act 1949 s 1(1) (amended by the Statute Law (Repeals) Act 1976), and other like enactments noted, in the sections of this title dealing with the respective countries. See also *Gohoho v Guinea Press Ltd* [1963] 1 QB 948, [1962] 3 All ER 785, CA; *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All ER 1060, DC. See further PARA 711.

9 A recital in an executive order made under statute should not be regarded as a conclusive executive statement or declaration for these purposes: *Ffrost v Stevenson* (1937) 58 CLR 528 at 549, 565-566, Aust HC.

10 *Christian v R* [2006] UKPC 47, [2007] 2 AC 400, [2007] 1 LRC 726; *The Fagernes* [1927] P 311, CA; *Post Office v Estuary Radio Ltd* [1967] 3 All ER 663 at 680, 682, [1967] 1 WLR 1396 at 1401, 1403-1404, CA; *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390, [1952] 2 All ER 64, CA; *Ex p Mwenya* [1960] 1 QB 241, [1959] 3 All ER 525, CA. See also *Duff Development Co v Kelantan Government* [1924] AC 797 at 808, 816, HL. It appears that a country may, by revolutionary means not expressly recognised by the Crown, cease to be a part of Her Majesty's dominions (*Madzimbamuto v Lardner-Burke and George* [1969] 1 AC 645 at 724-725, [1968] 3 All ER 561 at 574, PC), but it by no means follows that the English courts would in such circumstances depart from the principle that in any matter of this kind the courts are to accept as final the declaration of the appropriate executive authority in the United Kingdom: see *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390, [1952] 2 All ER 64, CA; *Duff Development Co v Kelantan Government* [1924] AC 797, HL.

11 *Ex p Mwenya* [1960] 1 QB 241, [1959] 3 All ER 525, CA.

12 See the Statute of Westminster 1931 s 1 (amended by the South Africa Act 1962 Sch 5); the Visiting Forces (British Commonwealth) Act 1933 s 8(1); and the Foreign Marriage Act 1947 s 3 (amended by the Newfoundland (Consequential Provisions) Act 1950 Schedule Pt II).

13 See also PARA 705.

708. 'Protectorate' and 'protected state'.

A territory, outside Her Majesty's dominions[1], for whose international relations Her Majesty's government was responsible[2] was styled a 'protectorate' or 'protected state'; no such territories now remain. Between these two categories of dependent territories there was no fixed line of demarcation, but in general a protected state enjoyed greater autonomy in that its internal administration was conducted wholly or substantially in the name of the local ruler, who was recognised in English courts as being entitled to sovereign immunity[3]. In a protectorate the Crown acquired jurisdiction[4] exercisable, by virtue of the Foreign Jurisdiction Act 1890, in as ample a manner as if it had acquired that jurisdiction by the conquest or cession of the territory[5]. In a protected state it was ordinarily unnecessary to bring that Act into operation in the territory, advice to the local ruler being sufficient for the discharge of the Crown's responsibilities.

Certain persons connected with a former protectorate, protected state or United Kingdom trust territory are 'British protected persons' for the purposes of the British Nationality Act 1981[6], even if they were also citizens of the United Kingdom and colonies under the British Nationality Act 1948[7]. It appears that allegiance in the full sense was not owed by virtue only of connection with such a territory[8].

1 Nevertheless, for certain purposes protectorates were treated as not outside Her Majesty's dominions: see PARA 707 text to notes 3-4.

2 This description of the Crown's relationship to a protectorate or protected state is a common statutory form: see eg the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962, SI 1962/2187, art 1(2)(a) (spent); cf *Sobhuza II v Miller* [1926] AC 518 at 522, PC.

3 *Mighell v Sultan of Johore* [1894] 1 QB 149, CA.

4 If in any proceedings a question arises as to the existence or extent of Her Majesty's jurisdiction in a foreign country (eg, formerly, a protectorate or protected state), a Secretary of State's decision and answers made and returned on the application of the court will be conclusive: see the Foreign Jurisdiction Act 1890 s 4. For an example see *Tshekedi Khama v High Comr* (1936) [1926-53] HCTLR 9 at 30-31; and see PARA 707 notes 9-11. In any enactment, 'Secretary of State' means one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1382. As to the office of Secretary of State see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

5 Foreign Jurisdiction Act 1890 s 1. In the sense used in the Foreign Jurisdiction Acts 1890 and 1913, a protectorate or protected state was a 'foreign country' (see the Foreign Jurisdiction Act 1890 s 16); the same is true, it seems, of the Foreign Marriage Act 1892 (other than s 22 (substituted by the Foreign Marriage Act 1947 s 2)), but this does not entail that such a state was not within the Commonwealth: see PARA 701. By contrast, a port in a colony or, apparently, anywhere in Her Majesty's dominions, is not a foreign port: *R v Liverpool Justices, ex p Molyneux* [1972] 2 QB 384, [1972] 2 All ER 471, DC; *Allan v McArthur* (1903) 23 NZLR 216, NZ SC.

6 British Nationality Act 1981 s 38; British Protectorates, Protected States and Protected Persons Order 1982, SI 1982/1070; British Nationality (Brunei) Order 1983, SI 1983/1699. A 'trust territory' was one administered under the trusteeship system of the United Nations: British Nationality Act 1948 s 32(1) (repealed); applied by the British Nationality Act 1981 s 38. See also the Mandated and Trust Territories Act 1947. As to the United Nations see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 5119 et seq.

7 *Motala v A-G* [1992] 1 AC 281, [1991] 4 All ER 682, HL. As to citizenship of the United Kingdom and colonies under the British Nationality Act 1948 Pt II (ss 4-22) (repealed) see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 16-21.

8 *Ol Le Njogo v A-G* (1913-14) 5 EALR 70 at 77, East Africa HC; *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576 at 620, CA; *The Ionian Ships* (1855) 2 Ecc & Ad 212 at 226; *R v Keyn* (1876) 2 ExD 63 at 236 per Cockburn CJ; *Tang Chai-On v A-G* [1970] HKLR 209 at 212, Hong Kong SC. But cf *Joyce v DPP* [1946] AC 347, [1946] 1 All ER 186, HL, as to the reciprocity of protection and allegiance.

(ii) Classification

709. The members of the Commonwealth.

The fully self-governing and independent members of the Commonwealth[1] are:

1. (1) Antigua and Barbuda;
2. (2) Australia;
3. (3) The Bahamas;
4. (4) Bangladesh;
5. (5) Barbados;
6. (6) Belize;
7. (7) Botswana;
8. (8) Brunei;
9. (9) Cameroon;
10. (10) Canada;
11. (11) The Republic of Cyprus;
12. (12) Dominica;
13. (13) Fiji Islands;
14. (14) The Gambia;
15. (15) Ghana;
16. (16) Grenada;
17. (17) Guyana;
18. (18) India;
19. (19) Jamaica;
20. (20) Kenya;
21. (21) Kiribati;
22. (22) Lesotho;
23. (23) Malawi;
24. (24) Malaysia;
25. (25) Maldives;
26. (26) Malta;
27. (27) Mauritius;
28. (28) Mozambique;
29. (29) Namibia;
30. (30) Nauru;
31. (31) New Zealand;
32. (32) Nigeria;
33. (33) Pakistan;
34. (34) Papua New Guinea;
35. (35) St Christopher ('St Kitts') and Nevis;
36. (36) St Lucia;
37. (37) St Vincent and the Grenadines;
38. (38) Samoa;
39. (39) Seychelles;
40. (40) Sierra Leone;
41. (41) Singapore;
42. (42) Solomon Islands;

43 (43) South Africa;
44 (44) Sri Lanka;
45 (45) Swaziland;
46 (46) The United Republic of Tanzania;
47 (47) Tonga;
48 (48) Trinidad and Tobago;
49 (49) Tuvalu;
50 (50) Uganda;
51 (51) The United Kingdom of Great Britain and Northern Ireland;
52 (52) Vanuatu;
53 (53) Zambia.

The countries within Her Majesty's dominions are: Antigua and Barbuda, Australia, Belize, The Bahamas, Barbados, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Solomon Islands, Tuvalu, and the United Kingdom.

1 As to the member countries see further PARA 735 et seq.

UPDATE

709 The members of the Commonwealth

TEXT AND NOTES--Rwanda (the Republic of Rwanda), though not having had any prior juridical connection with any member connection with any member of the Commonwealth, became a member on 28 November 2009.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(2) STATUS, ADMISSION AND WITHDRAWAL OF MEMBERS/710. International status of members of the Commonwealth.

(2) STATUS, ADMISSION AND WITHDRAWAL OF MEMBERS

710. International status of members of the Commonwealth.

The independent members of the Commonwealth are sovereign states in international law. They have independent treaty-making powers, are represented separately in international organisations and formulate independent foreign policies, have departments of external or foreign affairs, and appoint ambassadors, ministers or consuls to foreign countries. A declaration of war by Her Majesty in respect of a particular member, even a member within Her Majesty's dominions, does not involve any other member.

In respect of all members which have gained their independence since 1945, the relevant enactments have expressly provided that as from the date of independence the United Kingdom government has no responsibility for the government of the territory concerned. The autonomy and equal sovereignty of those members is thereby expressly provided for; the autonomy and equal sovereignty of Canada, the Commonwealth of Australia, and New Zealand, in the conduct of their international relations, is no less certainly guaranteed by constitutional convention and practice[1], and the law of those countries as understood in their courts.

1 This equality and autonomy in external affairs may be dated from 1926 at latest: see the Summary of the Proceedings of the Imperial Conference 1926 (Cmd 2768) p 14. See further PARA 722.

711. Membership of the Commonwealth.

No binding conventions have been formally enunciated to determine the conditions under which new members may be admitted to the Commonwealth. In the view of the United Kingdom[1], the grant of responsible self-government or independence to a colony or other dependent territory is a matter solely for the United Kingdom and the territory concerned, but the admission of a country to full membership of the Commonwealth must be preceded by consultation with all existing members. The modern practice has been for the Commonwealth Secretary General to take responsibility for conducting the appropriate consultations with all existing members and for formally announcing the admission of the new member on completion of those consultations. It has also been the practice for any member or formerly dependent territory which adopts a republican form of government, and which desires to continue or acquire membership of the Commonwealth, to seek from all other members (directly or through the Commonwealth Secretariat) their assurance that they would recognise, or continue to recognise, its membership on the understanding that it would accept the Queen as the symbol of the free association of the independent members and, as such, the Head of the Commonwealth[2].

No rule of the Commonwealth association precludes a member from seceding by unilateral action[3]. The withdrawal of a member, whatever its effect in terms of its own law, does not of itself alter the law of the United Kingdom[4], and its citizens do not in United Kingdom law cease to be Commonwealth citizens unless and until amending United Kingdom legislation takes effect.

1 See 488 HC Official Report (5th series), 7 June 1951, col 1207; 502 HC Official Report (5th Series), 16 June 1952, col 780; 526 HC Official Report (5th series), 28 April 1954, col 1625; 562 HC Official Report (5th series), 11 December 1956, col 239.

2 See eg the *Final Communiqué of the Commonwealth Prime Ministers' Meeting 1965* (Cmnd 2712) p 2 (with respect to The Gambia). In the absence of such approaches and assurances, membership lapses on the adoption of the republican form of government, as in the case of Fiji on 15 October 1987. See also *R v Governor of Brixton Prison, ex p Kahan* [1989] QB 716 at 722, [1989] 2 All ER 368 at 371, DC (where '1986' should read '1987').

3 No formalities are required to effect the withdrawal; a simple announcement by the government of the country suffices.

4 United Kingdom enactments have made provision consequential on the withdrawal of Eire, South Africa and Pakistan from the Commonwealth, and on Pakistan's and South Africa's resumption of membership: see PARAS 728, 770, 780. As to the statutory provisions normally made when a country ceases to be part of Her Majesty's dominions while remaining or becoming a member of the Commonwealth see PARAS 707 text and note 8, 721.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(2) STATUS, ADMISSION AND WITHDRAWAL OF MEMBERS/712. Commonwealth citizens and allegiance.

712. Commonwealth citizens and allegiance.

In United Kingdom law, the term 'Commonwealth citizen' signifies the status common to persons who by virtue of United Kingdom law are British citizens, British overseas territories citizens[1], British nationals (overseas), British overseas citizens, or British subjects[2], or who by virtue of an enactment in force in another member of the Commonwealth[3] are citizens of that other member[4]. Thus the status of Commonwealth citizen has no connection with former conceptions of common allegiance[5].

1 References to a British Dependent Territories citizen are now (as from 26 February 2002) to a British overseas territories citizen: British Overseas Territories Act 2002 s 1(2).

2 Thus, as from 1 January 1983, the term 'British subject' no longer denotes a status common to citizens of members of the Commonwealth, and instead, for purposes of United Kingdom law, denotes only a restricted and residual category of persons who are not British citizens, British overseas territories citizens, British nationals (overseas), or British overseas citizens or citizens of any member of the Commonwealth other than the United Kingdom: see the British Nationality Act 1981 Pt IV (ss 30-35) (amended by the Nationality, Immigration and Asylum Act 2002 Sch 2 para 1(i), Sch 9; the British Overseas Territories Act 2002 s 1(1)(b)). As to the interpretation of the term in existing and future enactments see the British Nationality Act 1981 s 51(1), (2); and the British Overseas Territories Act 2002 s 1(2). The category of British nationals (overseas) was created as from 1 July 1987 by the Hong Kong (British Nationality) Order 1986, SI 1986/948, art 4(1). See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

3 See the British Nationality Act 1981 Sch 3 (amended by the Brunei and Maldives Act 1985 Schedule; and by SI 1983/882; SI 1983/1699; SI 1989/1331; SI 1990/1502; SI 1994/1634; SI 1998/3161) which lists the 52 existing members of the Commonwealth outside the United Kingdom and also Zimbabwe, which has now withdrawn (see PARA 734). See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

4 British Nationality Act 1981 s 37(1) (amended by the British Nationality (Falkland Islands) Act 1983 s 4(3); the British Overseas Territories Act 2002 s 2(2)(b), Sch 1 para 4; and by SI 1986/948); Hong Kong (British Nationality) Order 1986, SI 1986/948, art 4.

5 As to the modern conception of allegiance see *Singh v Commonwealth of Australia* [2004] HCA 41, [2005] 3 LRC 290, Aust HC; *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72, [2004] 3 LRC 7, Aust HC; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 80 ALR 561, Aust HC; *Pochi v Minister for Immigration and Ethnic Affairs* (1982) 43 ALR 261 at 266, Aust HC, per Gibbs CJ; *McManus v Clouter* (1980) 29 ALR 101 at 116-118, NSW SC. It is not per se unlawful in one of Her Majesty's independent realms to act in aid of persons in rebellion against the Crown in another part of Her Majesty's dominions: *Bradley v Commonwealth of Australia* (1973) 1 ALR 241 at 260 (Aust HC) per Barwick CJ and Gibbs J.

UPDATE

712 Commonwealth citizens and allegiance

NOTE 3--British Nationality Act 1981 Sch 3 further amended: SI 2010/246.

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(3) THE CROWN IN THE COMMONWEALTH

(i) The Queen

713. The Head of the Commonwealth.

The Queen is recognised as Head of the Commonwealth by all members[1], and is as such the symbol of their free association as members. In the capacity of Head of the Commonwealth, however, Her Majesty is owed no allegiance and performs no constitutional functions[2].

1 See the Royal Titles Act 1953, preamble; Declaration of Commonwealth Prime Ministers, 27 April 1949 (see PARA 701 note 3); statement of the Under-Secretary of State of Foreign and Commonwealth Affairs, 841 HC Official Report (5th series), 18 July 1972, col 535.

2 See *McManus v Clouter* (1980) 29 ALR 101 at 117, NSW SC; and PARA 712 note 5. It was formally recorded at the Meeting of Commonwealth Prime Ministers in 1949 (see note 1) that the designation of the King as Head of the Commonwealth did not connote any change in the constitutional relations existing between the members of the Commonwealth, and in particular did not imply that the King discharged any constitutional functions by virtue of that headship.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(3) THE CROWN IN THE COMMONWEALTH/(i) The Queen/714. The Queen in Her Majesty's dominions.

714. The Queen in Her Majesty's dominions.

In virtue of Her Majesty's sovereignty in the United Kingdom, but by virtue of and subject to the law of the member concerned, the Queen is sovereign, head of state and invested with the executive power in each member remaining within Her Majesty's dominions[1].

Any alteration by the United Kingdom Parliament in the law touching the succession to the throne[2] may be ineffective to alter the succession to the throne in respect of, and in accordance with the law of, any other independent member which was within Her Majesty's dominions at the time of such alteration. Convention may therefore require that the assent of each member within Her Majesty's dominions be obtained in respect of any such alteration in the law of the United Kingdom[3].

Declarations of the incapacity of the Sovereign made under the Regency Act 1937[4] must be communicated to the governments of Her Majesty's Dominions[5], which for these purposes are Canada, Australia, New Zealand[6] and, it appears, those other members of the Commonwealth that are within Her Majesty's dominions[7].

1 The members so remaining are listed in PARA 709.

2 Eg the Act of Settlement (1700) s 1; His Majesty's Declaration of Abdication Act 1936 s 1(1), (2). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

3 See the Statute of Westminster 1931, preamble ('assent of the Parliaments of all the Dominions'); His Majesty's Declaration of Abdication Act 1936, preamble (the enactment of that Act was assented to by the governments of all the then Dominions before it was passed, and by the Parliaments of those Dominions thereafter); and the Ireland Act 1949 s 3(3).

4 See the Regency Act 1937 s 2(1).

5 Regency Act 1937 s 2(2) (amended by the Statute Law (Repeals) Act 1995).

6 Canada, Australia and New Zealand were Dominions in 1937.

7 As to the distinction between Dominions and dominions see PARA 707.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(3) THE CROWN IN THE COMMONWEALTH/(i) The Queen/715. The Crown in independent members within Her Majesty's dominions.

715. The Crown in independent members within Her Majesty's dominions.

The executive power in each independent member of the Commonwealth within Her Majesty's dominions is vested in Her Majesty, who is in almost every case also an essential component in the legislature of the member. The functions exercised by Her Majesty in person include the appointment of the Governor General and direct relations with Prime Ministers and High Commissioners; they may extend also to the issue of new instruments relating to the office of Governor General, the approval of seals, and the grant of honours and other marks of distinction. In the exercise of all her functions the Queen is to act on the advice of the government of the member concerned, and it would be unconstitutional for the United Kingdom government to tender advice to her in any matter relating solely to the affairs of another member against that member's views[1].

The executive powers and legislative functions of Her Majesty in respect of each member within Her Majesty's dominions are exercisable by the Governor General as the Queen's representative, in the manner subsequently discussed[2]. Save where the legislation of the member concerned makes other provision[3], the powers so exercisable by the Governor General are not properly exercisable by Her Majesty[4].

1 Summary of the Proceedings of the Imperial Conference 1926 (Cmd 2768) p 17.

2 See PARA 718.

3 In New Zealand, the Commonwealth of Australia, and the Australian states, provision is made for the exercise by Her Majesty in person, at least when she is personally present in the country or state, of any royal power exercisable by the Governor General on behalf of Her Majesty: Constitution Act 1986 (1986/114) (NZ) s 3; Royal Powers Act 1953 (Aust) s 2(1); Australia Act 1986 s 7(4).

4 Thus Her Majesty's private secretary's letter dated 17 November 1975, replying on her behalf to a letter of the Speaker of the Australian House of Representatives, stated that 'it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor General' as 'the representative of the Queen of Australia', and that 'the Queen has no part in the decisions which the Governor General must take in accordance with the Constitution'.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(3) THE CROWN IN THE COMMONWEALTH/(i) The Queen/716. The royal style and titles.

716. The royal style and titles.

Members within Her Majesty's dominions use, each for its own purposes, forms of title suited to their particular circumstances while retaining, by convention, a substantial element common to all[1]. In most countries the title is brought into effect by royal proclamation[2] issued on the advice of Her Majesty's ministers in the member concerned; there is now no convention that the promulgation of new titles in respect of one member requires the assent of other members, at least provided the conventional common element is retained, namely the designation of Her Majesty as 'Head of the Commonwealth' and a reference to 'Her other Realms and Territories'. There may, however, remain a convention that changes in the royal titles in respect of the United Kingdom require the assent of members within Her Majesty's dominions[3].

1 See the Title of the Sovereign 1953 (Cmd 8748); Royal Titles Act 1953, preamble.

2 As to the United Kingdom see the Royal Titles Act 1953 s 1; Proclamation dated 28 May 1953 ('Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith').

3 See the Ireland Act 1949 s 3(3).

(ii) Unity and Divisibility of the Crown

717. Unity and divisibility of the Crown in Her Majesty's dominions.

The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown[1]. This general principle is not inconsistent with the further principle that on the grant of a representative legislature, and perhaps even as from the setting up of courts, a legislative council and other such structures of government, Her Majesty's government in a colony is to be regarded as distinct from Her Majesty's government in the United Kingdom[2]. To the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature[3], but in respect of any British overseas territory or other dependency of the United Kingdom, acts of Her Majesty herself are performed only on the advice of the United Kingdom government[4].

There are, moreover, justiciable consequences of the unity of this undivided Crown. For instance, a soldier who enters military service in a colony enters the service of the Crown, so that payment by Her Majesty's government in the United Kingdom is capable of discharging the obligations of the colonial government under his contract of service[5]. Again, the Crown's prerogative priority over its subjects in respect of debts[6] may be claimed in the courts of one part of Her Majesty's dominions (at least within the aforementioned realm) not only by the Crown in right of that part but also, and on an equal footing[7], by the Crown in right of any other part of Her Majesty's dominions[8]. However, the revenue laws of one part of Her Majesty's dominions cannot be enforced in the courts of another part[9], and the liabilities of the Crown in right of, or under the laws of, one of the Crown's territories can be satisfied only out of the revenues, and by the authority of the legislature, of that territory[10].

Between independent members of the Commonwealth remaining within Her Majesty's dominions, the position is doubtless different. Since Her Majesty is sovereign in such members by virtue of the law, not of the United Kingdom but of that other member, but nevertheless (according to the law of that member) in virtue principally of her title to the throne in the United Kingdom[11], there is in some respects only one undivided Crown throughout all Her Majesty's dependent and independent realms and territories; but in more fundamental respects, there are as many Crowns as there are independent realms[12]. Her Majesty's government in one independent member has no responsibility for or in respect of the territory or government or dependencies of any other member. The Crown in one member, together with its governmental organs and representatives, is entitled to sovereign immunity[13] (and is subject to disabilities[14]) in the courts of another member on the same basis as any other[15] foreign state.

1 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61 at [47], [2008] 4 All ER 1055 at [47], [2008] 3 WLR 955 at [47], [2008] 5 LRC 769 at [47], quoting with approval the paragraph corresponding to the text and notes 1-4 in a previous edition of this title (see also *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor*[2008] EWCA Civ 1319 at [106], [2009] 2 WLR 1205 at [106], [2008] All ER (D) 32 (Dec)). Cf *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*[2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 377. See also *Theodore v Duncan*[1919] AC 696 at 706, PC; *Williams v Howarth*[1905] AC 551, PC; *Liquidators of Maritime Bank of Canada v Receiver-General of New Brunswick*[1892] AC 437 at 441, 444, PC; *R v Bank of Nova Scotia* (1885) 11 SCR 1, Can SC; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152, Aust HC; *Minister for Works (Western Australia) v Gulson* (1944) 69 CLR 338 at 356-

357, 366, Aust HC; *Re Commonwealth Agricultural Service Engineers Ltd* [1928] SASR 342, S Aust FC, per Murray CJ; *Robinson v Western Australian Museum* (1977) 16 ALR 623 at 647, Aust HC, per Gibbs J; *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 24 ALR 9 at 21, 26, 31, cf 35, Aust HC; cf *R in right of Alberta v Canadian Transport Commission* (1977) 75 DLR (3d) 257, Can SC. Since the development of the notion of independent membership of the Commonwealth (whether within or outside Her Majesty's dominions) it should not be assumed that the older cases mentioned above still correctly represent the legal status of the governments of Canada, the provinces of Canada, the Commonwealth of Australia or the states of Australia in the courts of the United Kingdom or of other independent members within Her Majesty's dominions (even if they still represent inter-governmental relations within the respective federations for reasons concerned more with the unity of a federation than with the unity of the Crown) (cf notes 7, 14); but it is thought that they still accurately represent the law as to the unity of the Crown within the one realm constituted by the United Kingdom and British overseas territories.

2 See *Manuel v A-G* [1983] Ch 77 at 90-95, CA; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta*[1982] QB 892 at 921-922 (citing the paragraph corresponding to this paragraph in a previous edition of this title), 927, 928-931, cf 911, 916, 917, [1982] 2 All ER 118 at 132, 136-138, cf 123, 126, 127-128, CA (petition dismissed [1982] QB 892 at 937, [1982] 2 All ER 118 at 143, HL); *Tito v Waddell (No 2)*[1977] Ch 106 at 231 (citing the paragraph corresponding to this paragraph in a previous edition of this title), 320, [1977] 3 All ER 129 at 233, 306; *R v Secretary of State for the Home Department, ex p Shadeo Bhurosah*[1968] 1 QB 266, DC (affd [1968] 1 QB 266 at 278, [1967] 3 All ER 831, CA); and the cases cited in note 3.

3 Thus the powers of the Crown are exercisable, on the advice of different ministers, by different agents in different localities: *Theodore v Duncan*[1919] AC 696 at 706, PC; *Dominion of Canada v Province of Ontario*[1910] AC 637 at 645, PC; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152, Aust HC. It is not altogether clear to what extent this doctrine of distinct agents, capable of entering into justiciable relations one with another, depends on the degree of 'responsible government' in the sense of responsibility of Her Majesty's ministers in a territory to a local representative legislature. Perhaps what is decisive for many purposes is the existence of separate treasuries or consolidated funds: see *A-G v Great Southern and Western Rly Co of Ireland*[1925] AC 754 at 779, HL, per Lord Phillimore; *Fairthorn v Territory of Papua* (1938) 60 CLR 772 at 792, Aust HC, per Dixon J; and see also the cases cited in note 15.

4 See Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) p 81.

5 *Williams v Howarth*[1905] AC 551, PC.

6 See *New South Wales Taxation Comr v Palmer*[1907] AC 179, PC; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. This prerogative is a 'minor' prerogative and is subject to local legislation: *Colonial Government v Laborde* (1902) Mauritius Reports 19, Mauritius SC; *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick*[1892] AC 437 at 441, PC.

7 *Federal Taxation Comr v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 286, Aust HC, per Latham CJ; *Re Richard Foreman & Sons Pty Ltd, Uther v Federal Taxation Comr* (1947) 74 CLR 508 at 523, Aust HC, per Rich J, at 536 per McTiernan J, at 536, 538, 540 per Williams J (overruled on distinguishable grounds in *Commonwealth of Australia v Cigamatic Pty Ltd* (1962) 108 CLR 372, Aust HC); *Re Union Theatres Ltd* (1933) 35 WALR 89, W Aust SC; *Re Walter's Trucking Service Ltd, R in right of the Province of Alberta v A-G for Canada* (1965) 50 DLR (2d) 711 at 716, 719, Alta CA; *Crawford's Ltd v Wanhil Line Construction Co Ltd* (1969) 7 DLR (3d) 444 at 462 (Sask); *Re John Wiper Ltd* (1972) 5 SASR 360, S Aust SC; cf *Re Silver Bros Ltd, A-G for Quebec v A-G for Canada*[1932] AC 514 at 525, PC.

8 *Re Oriental Bank Corpn, ex p R*(1884) 28 ChD 643; *R v Bank of Nova Scotia* (1885) 11 SCR 1, Can SC; *Re Commonwealth Agricultural Service Engineers Ltd* [1928] SASR 342, S Aust FC; *Re Judgments Act, R v Hamilton* (1962) 37 DLR (2d) 545 at 555, 558 (Man); and see the cases cited in note 7. As to the position as between independent parts of the Commonwealth see the text and notes 13-14.

9 *Sydney Municipal Council v Bull*[1909] 1 KB 7.

10 See *Manuel v A-G* [1983] Ch 77 at 90-95, CA; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta*[1982] QB 892 at 921-922 (citing the paragraph corresponding to this paragraph in a previous edition of this title), 927, 928-931, cf 911, 916, 917, [1982] 2 All ER 118 at 132, 136-138, cf 123, 126, 127-128, CA; on appeal [1982] QB 892 at 937, [1982] 2 All ER 118 at 143, HL. See also *A-G v Great Southern and Western Rly Co of Ireland*[1925] AC 754 at 774, HL, per Lord Haldane, and at 779 per Lord Phillimore; *Re Holmes* (1861) 2 John & H 527; *Fairthorn v Territory of Papua* (1938) 60 CLR 772 at 792, Aust HC, per Dixon J; *Federal Taxation Comr v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 303, Aust HC, per Dixon J.

11 Ie in accordance with the law of the United Kingdom.

12 *Tito v Waddell (No 2)*[1977] Ch 106 at 231, [1977] 3 All ER 129 at 233 (citing the paragraph corresponding to this paragraph in a previous edition of this title).

13 *Rahimtoola v Nizam of Hyderabad*[1958] AC 379, [1957] 3 All ER 441, HL (independent member within Her Majesty's dominions at the issue of the writ in the action, and outside Her Majesty's dominions at the time of appeal); *Kahan v Federation of Pakistan*[1951] 2 KB 1003, CA (independent member within Her Majesty's dominions); *Mellenger v New Brunswick Development Corpn*[1971] 2 All ER 593, [1971] 1 WLR 604, CA (province of independent member within Her Majesty's dominions); *Manuel v A-G* [1983] Ch 77, CA; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta*[1982] QB 892, [1982] 2 All ER 118, CA.

14 Thus claims to recover taxes due under the laws of one independent member are unenforceable in the courts of another member: see *Government of India, Ministry of Finance (Revenue Division) v Taylor*[1955] AC 491, [1955] 1 All ER 292, HL.

15 Thus eg in the United Kingdom, New Zealand is for many if not all purposes a foreign state (*A-G of New Zealand v Ortiz* [1984] AC 1 at 20, CA) and eg in Australia, the United Kingdom is for many if not all purposes a foreign country (*Sue v Hill* (1999) 199 CLR 462, 163 ALR 648, Aust HC; *A-G (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, Aust HC).

UPDATE

717 Unity and divisibility of the Crown in Her Majesty's dominions

NOTE 1--*Bancoult*, cited, reported at [2009] 1 AC 453; *Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

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718. The Crown's representative in independent members.

The Governors General of members within Her Majesty's dominions are appointed on the advice exclusively of ministers of the member concerned (in some cases with the approval of other instrumentalities of that member), the formal advice normally being tendered after informal consultation with Her Majesty[1]. The channel of communication between the Sovereign and the member government is a matter concerning the Sovereign and that government alone. The form of appointment is passed on the advice of that member[2], and the validity of an appointment, and the powers of a person so appointed, are subject to the provisions of that member's Constitution and other applicable laws[3].

Subject to the constitutional provisions of some member countries, the term of a Governor General's office is in law at pleasure and in practice usually for five years, but may be extended. Advice as to the termination of the period of the Governor General's office before the expiry of the usual term rests exclusively with the relevant instrumentalities of the member concerned.

The authority of the representative of the Crown extends, even without express delegation but subject to the terms of his commission (if any)[4] and to any other statutory or constitutional provisions, to the exercise of the royal prerogative in so far as it is applicable to the internal or external[5] affairs of the member, state or province consistently with the constitutional scheme of division of legislative and executive powers within the member concerned[6].

While the Queen is not subject to the jurisdiction of her courts, the representatives of the Crown, not having the character of a viceroy[7], are liable to suit in the territory for tortious or ultra vires acts done in purported exercise of their official functions[8], though not for contracts made in their official capacity[9]. They may also be sued in the courts of the member or territory in respect of private claims whether arising within or without the territory[10]. But where the cause of action arises in respect of a purported exercise of official powers, it is more proper for suit to be brought against the Attorney General[11].

1 Summary of the Proceedings of the Imperial Conference 1930 (Cmd 3717) p 27.

2 See eg Letters Patent dated 21 August 1984 (Commonwealth of Australia Gazette s 334 of 1984); Letters Patent constituting the office of Governor General of New Zealand dated 28 October 1983, SR 1983/225 (NZ). Appointment in other realms is generally by commission under the Royal Sign Manual and Signet. Appointment and termination of appointment of Governors of Australian states is by Her Majesty on the advice of the state Premier: Australia Act 1986 s 7(2), (3), (5).

3 *Re Nori's Application* [1989] LRC (Const) 10, Solomon Is HC.

4 In countries which obtained independence within Her Majesty's dominions without previously enjoying the status of a Dominion within the meaning of the Statute of Westminster 1931, no prerogative instruments separate from the respective Constitutions are issued for conferring powers on the office of Governor General; the respective Constitutions make specific and detailed provision for the exercise of powers by the Governor General, and the powers of the office may be assumed to be capable of extending (subject to any restrictive provisions in the Constitution) as is required for the exercise of the executive power in and of the member concerned.

5 Thus, although the right to enter into treaties is a prerogative power of the Crown and no one other than Her Majesty can conclude a treaty, this prerogative power is in practice exercisable on behalf of Her Majesty by the Governor-General (or indeed by a minister acting under the Governor-General's authority), and can be exercised, whether by way of signature or of ratification, without the advice and consent of the legislature

(though treaties made in the exercise of this unqualified executive power do not form part of the law of the territory unless and until enacted directly or indirectly by the legislature): *Roberts v Minister of Foreign Affairs* [2007] UKPC 56, [2008] 3 LRC 261, [2007] All ER (D) 219 (Oct).

6 *Liquidators of Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437, PC; *Bonanza Creek Gold Mining Co Ltd v R* [1916] 1 AC 566, PC (power to create corporate bodies assumed to belong to Lieutenant Governor); *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 440, Aust HC; *Commonwealth v New South Wales* (1923) 33 CLR 1 at 37, 46-47, Aust HC; cf *Victoria v Commonwealth* (1971) 122 CLR 353 at 379, [1971] ALR 449 at 461-462, Aust HC, per Barwick CJ.

7 See PARA 816; cf *Victoria v Commonwealth* (1971) 122 CLR 353 at 379, [1971] ALR 449 at 461-462, Aust HC, per Barwick CJ.

8 *Knowles v Superintendent of HM Prison Fox Hill* [2005] UKPC 17, [2005] 1 WLR 2546, [2005] 4 LRC 313; *Hochoy v National Union of Government Employees* (1964) 7 WIR 174, Trinidad and Tobago CA; but cf *Cormack v Cope* (1974) 3 ALR 419 at 424, Aust HC. See further PARA 820 notes 1-4.

9 *Macbeath v Haldimand* (1786) 1 Term Rep 172; cf *Kidman v Commonwealth of Australia* (1925) 32 ALR 1 at 2, PC, per Lord Haldane.

10 See PARA 820.

11 See *Hochoy v National Union of Government Employees* (1964) 7 WIR 174 at 181, Trinidad and Tobago CA, per Wooding CJ.

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719. Consequences of Crown sovereignty: jurisdiction of the Privy Council.

The jurisdiction of the Privy Council to entertain appeals and other matters affecting the administration of justice in any part of Her Majesty's dominions was formerly regarded as an aspect of the royal prerogative, not grounded upon although regulated by the Judicial Committee Acts, the Orders in Council made under those Acts, and any local Constitutions or legislation[1], but may now be understood as in substance a statutory right with a purely formal prerogative element attached[2]. The jurisdiction will subsist while a territory remains within Her Majesty's dominions, notwithstanding the attainment of independence by that territory[3], unless and until a legislature which has the power to enact legislation having extra-territorial effect and repugnant to United Kingdom legislation[4] validly abolishes the right to apply to Her Majesty in Council for leave to appeal to the Privy Council.

1 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 at 630-633, [1967] 3 All ER 523 at 528-530, PC; *R v Bertrand* (1867) LR 1 PC 520 at 530; *A-G for Ontario v A-G for Canada* [1947] AC 127 at 145, [1947] 1 All ER 137 at 141, PC; cf *Southern Centre of Theosophy Inc v South Australia* (1979) 27 ALR 59 at 63-65, Aust HC. The principal United Kingdom enactments are the Judicial Committee Act 1833 and the Judicial Committee Act 1844; as to other enactments, and generally, see **COURTS**. As to the powers of local legislatures to regulate appeals to the Privy Council see PARA 830.

2 *Grant v R* [2004] UKPC 27, [2004] 2 AC 550, [2005] 1 LRC 256, citing and applying *De Morgan v Director-General of Social Welfare* [1998] AC 275, [1998] 2 LRC 41, PC (in which the authorities cited in note 1 are not mentioned).

3 *Ibralebbe v R* [1964] AC 900, [1964] 1 All ER 251, PC; *Southern Centre of Theosophy Inc v South Australia* (1979) 27 ALR 59, Aust HC. See also *Hull v M'Kenna* [1926] IR 402 at 404, PC; *Lord Strickland v Grima* [1930] AC 285, PC. Conversely, when a territory ceases to be a part of Her Majesty's dominions, the jurisdiction of Her Majesty in Council lapses, though special arrangement may be made to provide for the hearing of appeals by the Judicial Committee as such: see PARA 721 text and notes 2-3; and **COURTS**.

4 Compare *Nadan v R* [1926] AC 482, PC, with *British Coal Corpn v R* [1935] AC 500, PC, and *A-G for Ontario v A-G for Canada* [1947] AC 127, [1947] 1 All ER 137, PC; and see the analysis of those cases in *Woolworths (New Zealand) Ltd v Wynne* [1952] NZLR 496 at 512-528, NZ CA, per Adams J.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/1. THE COMMONWEALTH ASSOCIATION/(4) ATTAINMENT AND CONSEQUENCES OF INDEPENDENCE/(i) Independence from an Appointed Day/720. Statutory grant of independence, and consequential provision.

(4) ATTAINMENT AND CONSEQUENCES OF INDEPENDENCE

(i) Independence from an Appointed Day

720. Statutory grant of independence, and consequential provision.

Provision has been made, by United Kingdom statute, either for or in connection with[1] the gaining of the independence (that is, fully responsible status) of each member of the Commonwealth[2] which has gained that independence since 1950[3], with the exception only of those members which gained independence from members, other than the United Kingdom, of which they were formerly constitutive parts[4] or dependent territories[5]. The provision so made is, in each case, operative from or in relation to a date appointed in or under the authority of the statute. Where that provision includes an authorisation of the grant of independence (that is, all such cases save where the territory was in the nature of a protected state) the statute is styled an Independence Act.

The two principal provisions in a typical Independence Act are: (1) that as from an appointed day (that is, independence day) Her Majesty's government in the United Kingdom is no longer to have any responsibility for the government of the territory concerned; and (2) that no Act of the United Kingdom Parliament passed on or after the appointed day is to extend to the territory as part of the law of that territory[6]. Scheduled to the typical Independence Act are provisions, corresponding to sections of the Statute of Westminster 1931[7], to the effect that neither the Colonial Laws Validity Act 1865[8], nor the doctrines of repugnancy[9] and of extra-territorial legislative incompetence[10], nor the requirements remaining in certain imperial (that is, United Kingdom) statutes for the reservation of certain bills[11], are to apply to any law made after independence by the legislature of the territory concerned.

Further provisions contained in or scheduled to both the typical Independence Act and the typical statute making provision in connection with the independence of a protected state relate to nationality and citizenship[12], and amend the law of the United Kingdom but do not affect the law of the newly independent territory[13]. These amendments ordinarily concern the interpretation of future Acts of the United Kingdom Parliament[14], the immunities and privileges of representatives of the new member of the Commonwealth[15], the provisions relating to attachment, command, discipline and jurisdiction over visiting forces[16], and certain enactments regulating shipping, civil aviation and copyright[17].

Further provision as to the application of United Kingdom law in relation to the newly independent territory (that is, as to the status, in and for the purposes of United Kingdom law, of the territory and of persons and things connected with it)[18] is not required unless and until the territory ceases to be part of Her Majesty's dominions[19]. Special provision for the continuity of application of United Kingdom law in relation to the newly independent territory was, however, required where the territory was before independence outside Her Majesty's dominions (where it was, for example, a protectorate) and remained outside those dominions, though within the Commonwealth, on grant of independence[20].

1 The grant of independence within the Commonwealth has been provided for by statute in the case of colonies and those protectorates in which the Crown exercised quasi-sovereign jurisdiction (see PARA 707); grant of independence to territories in the nature of protected states was by prerogative termination of the

responsibility, powers and jurisdiction of the Crown or of Her Majesty's government in the United Kingdom in respect of the territory, and any statutory provisions in connection with the change in status were of only consequential scope and effect, and were not considered necessary where the territory was not to become a member of the Commonwealth on attaining independence (see note 2).

2 Where a protectorate, protected state or mandated or trust territory ceased to be a United Kingdom dependent territory without becoming a member of the Commonwealth, statutory provision was not required to authorise the change of status, and statutory provision in connection with the change of status is not always considered necessary or expedient.

3 The provisions for grant of independence to India, Pakistan and Ceylon in 1947 fall into a category of their own, but are now of only historical interest. As to Canada, Australia and New Zealand see PARA 722.

4 As to Singapore see PARA 778; and as to Bangladesh see PARA 739.

5 As to Nauru see PARA 767; and as to Samoa see PARA 775.

6 See *Manuel v A-G* [1983] Ch 77 at 88, CA. In *Ibralebbe v R*[1964] AC 900 at 918, [1964] 1 All ER 251 at 257, PC, the Judicial Committee of the Privy Council referred to the grant of independence to Ceylon, provided for in the Ceylon Independence Act 1947 (see note 3), as 'irrevocable'. See also *Ndlwana v Hofmeyr* 1937 AD 229 at 237, SA App Div. Nonetheless, the legislature of the now independent territory may choose, both before and after independence, to exercise its sovereignty by legislation which expressly or impliedly adopts one or more enactments of the United Kingdom Parliament (or of any other legislature), and may choose to adopt by ambulatory reference whatever amendments Parliament may choose to make after the date of the legislation: *Naduaniwai v Commander, Republic of Fiji Military Forces* [2004] FJHC 10, [2005] 3 LRC 178, Fiji HC.

7 Ie the Statute of Westminster 1931 ss 2, 3.

8 See PARA 827. This provision was not required in respect of certain former protectorates or protected states, not subject to the Colonial Laws Validity Act 1865 before independence and not becoming part of Her Majesty's dominions on independence, eg Zanzibar, Botswana (Bechuanaland) and Tonga.

9 See PARA 829. See also note 8.

10 See PARA 828. See also note 8.

11 See note 8.

12 See PARA 712; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

13 As to the application and extension of United Kingdom statutes to Commonwealth countries either as part of the law of those countries or as part of the law of the United Kingdom only see generally PARA 871.

14 In particular, references to a 'colony' in any Act of the United Kingdom Parliament passed on or after the appointed day are not to include the territory concerned. See further PARA 705 text and note 6.

15 See generally PARA 724 et seq.

16 As to provisions relating to visiting forces see **ARMED FORCES**.

17 As to provisions relating to shipping see **SHIPPING AND NAVIGATION**; as to provisions relating to civil aviation see **AIR LAW**; and as to provisions relating to copyright see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS**.

18 As to the distinction between 'application' in this sense and 'application' in reference to the extension of United Kingdom enactments to a territory outside the United Kingdom as part of the law of that territory see PARA 871.

19 As to the provisions typically made in that event, and other consequences of leaving Her Majesty's dominions, see PARA 721.

20 Thus, in relation to Zanzibar (see PARA 783), Zambia, Botswana and Tonga, it was provided that on and after independence day all law in force on that day (or made and passed before that day and coming into force thereafter) has, unless and until contrary provision is made by Parliament or some other authority having power in that behalf, the same operation in relation to the territory concerned, and to persons and things belonging to or connected with it, as it would have if there had been no change in the status of the territory: see the Zanzibar Act 1963 s 1(1); the Zambia Independence Act 1964 s 2(1); the Botswana Independence Act 1966 s 2(1); and the Tonga Act 1970 s 1(2). No such provision was needed or made when Mozambique and Cameroon

became members of the Commonwealth as independent countries not connected with the United Kingdom or any other member of the Commonwealth immediately prior to their becoming members.

721. Consequences of leaving Her Majesty's dominions.

For the purposes of the law of the member concerned, the principal consequence entailed by transfer to republican or other status outside Her Majesty's dominions but within the Commonwealth is the termination of any subsisting judicial jurisdiction of Her Majesty's Privy Council[1] in respect of the member concerned. Sometimes provision is made in the law of the member concerned, conferring appellate jurisdiction on the Judicial Committee itself[2]; petitions are then addressed not to Her Majesty but to the Judicial Committee, whose jurisdiction in such cases is purely statutory and in no way involves the Crown's prerogative[3]; and judgment may then be given by the Judicial Committee in ordinary judicial form, rather than by way of advice to Her Majesty followed by the making of an Order in Council disposing of the appeal.

For the purpose of United Kingdom law it is customary to make statutory provision[4] to the effect that the law of the United Kingdom, as existing on the date when a member of the Commonwealth leaves Her Majesty's dominions and in so far as that law operated in relation to (though not as part of the law of) that member and to persons and things belonging to or connected with the member, is not affected by that member's change of status within the Commonwealth. Thus, until other provision is made, the member concerned, and any person or thing connected with it, is to be treated as if it were still part of Her Majesty's dominions[5]. These statutory provisions have a like effect on the law of the British overseas territories, at least in so far as the law of those territories consists of United Kingdom Acts extending to them as part of their law and of Orders in Council so extending such Acts.

1 As to this jurisdiction in respect of the Commonwealth generally see PARA 719.

2 Dominica (see PARA 749), Kiribati (see PARA 758), Mauritius (see PARA 764) and Trinidad and Tobago (see PARA 785), have provided for such appeals.

3 *Dow Jones Publishing Co (Asia) Inc v A-G of Singapore* [1989] 1 WLR 1308, PC.

4 Eg the India (Consequential Provision) Act 1949; the Sri Lanka Republic Act 1972.

5 *Gohoho v Guinea Press Ltd* [1963] 1 QB 948, [1962] 3 All ER 785, CA; *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All ER 1060, DC; *Armah v Government of Ghana* [1968] AC 192 at 200-201, [1966] 2 All ER 1006 at 1010, DC (revsd on other grounds [1968] AC 192 at 208, [1966] 3 All ER 177, HL).

(ii) Independence by Evolution

722. Special position of Canada, Australia and New Zealand.

The independent status of Canada, the Commonwealth of Australia and New Zealand was gained by evolution rather than by enactment, and cannot be said to have been gained on any particular date or dates[1]. The termination of responsibility of United Kingdom ministers for the government of those countries was not by enactment[2]. However, the power of the United Kingdom Parliament was so terminated[3], though in the case of New Zealand the enactment in question was by the New Zealand, and not by the United Kingdom, Parliament[4].

1 See *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta*[1982] QB 892 at 933, 935-936, [1982] 2 All ER 118 at 140, 142, CA; cf at 917-918, 927-928 and 128, 135 respectively. As to the time at which, or period over which, Australia became independent and the United Kingdom accordingly became for purposes of Australian law a foreign power see *Shaw v Minister of Immigration and Multicultural Affairs* [2003] HCA 72, 218 CLR 28, 203 ALR 143, [2004] 3 LRC 7, Aust HC; *Sue v Hill* (1999) 199 CLR 462, 163 ALR 648, Aust HC. On the circumstance that independence was attained as a result of legally efficacious practice and legal opinion rather than of any one ascertainable legislative act, cf *Bonser v La Macchia* (1969) 122 CLR 177 at 189, [1969] ALR 741 at 748, Aust HC, per Barwick CJ, and at 223-224 and 772 per Windeyer J. For an earlier statement on the legal effect of general constitutional development see *Commonwealth v Kreglinger and Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 411-414, 32 ALR 161 at 176-177, Aust HC, per Isaacs J. As to New Zealand's independence see *Re Ashman (Note)* [1985] 2 NZLR 224, NZ SC, 1976.

2 Save in the case of the states (but not the Commonwealth) of Australia: see the Australia Act 1986 s 10.

3 Ie as to Canada, by the Canada Act 1982 s 2 (in force 17 April 1982: Proclamation of Her Majesty dated 17 April 1982, SI/82-97 (Canada)); and as to the Commonwealth and states and territories of Australia, by the Australia Act 1986 s 1 (in force 3 March 1986: Australia Act (Commencement) Order 1986, SI 1986/319). As to the validity of the Canada Act 1982 see *Manuel v A-G*[1983] Ch 77, CA.

4 Constitution Act 1986 (1986/114) (NZ) s 15(2), effective as from 1 January 1987, from which date, moreover, the Statute of Westminster has no effect as part of the law of New Zealand (Constitution Act 1986 (1986/114) (NZ) s 26(1)). The power of the New Zealand Parliament to pass this enactment derived, at least in part, from the Statute of Westminster 1931 s 2(2).

(5) COMMONWEALTH REPRESENTATIVES AND ORGANISATIONS

723. The Commonwealth Secretariat.

The Commonwealth Secretariat was established by the Commonwealth Prime Ministers' Meeting of June 1965, and came into existence on 1 July 1965[1]. The Secretariat has by statute the legal capacity of a body corporate[2], but derives its functions from the authority of Commonwealth heads of government, and is at the service of Commonwealth countries collectively. The chief officer of the Secretariat is the Secretary General, who is appointed by Commonwealth heads of government collectively, and is equivalent in rank to a senior High Commissioner[3].

The Secretariat has immunity in the United Kingdom[4] from suit and legal process, except in respect of a civil claim for damage alleged to have been caused by a motor vehicle belonging to or operated on behalf of the Secretariat or in respect of a motor traffic offence involving such a vehicle[5]. The Secretariat's premises, archives and communications enjoy inviolability as if they pertained to a foreign diplomatic mission[6]; exemptions from income tax, capital gains tax and any non-domestic rate are accorded as if the Secretariat and its premises were a foreign diplomatic mission and its premises[7]. Goods directly imported by the Secretariat and necessary for its official use are exempt from import duties[8]. Senior officers of the Secretariat, if citizens of a member country[9] and permanently resident outside the United Kingdom, and members of their families forming part of their households (other than members who are only British citizens, British overseas territories citizens or British overseas citizens), have the same privileges and immunities as a diplomatic agent and the members of his family forming part of his household[10]. Every other officer and servant of the Secretariat, and the President and every member of the Commonwealth Secretariat Arbitral Tribunal, has immunity from suit and legal process in respect of acts or omissions in the course of official duties, but not in respect of a civil claim for damage alleged to have been caused by a motor vehicle belonging to or driven by him, or in respect of a motor traffic offence involving such a vehicle; his official papers and documents enjoy the same inviolability as if he were the diplomatic agent of a foreign diplomatic mission[11].

The above mentioned privileges and immunities of the Secretariat, its officers and servants and members of their families, and the President and every member of the Commonwealth Secretariat Arbitral Tribunal, may be waived by the Secretary General or any person for the time being exercising his functions[12].

1 See the Commonwealth Secretariat Act 1966 ss 1(5), 2(2); and see also Agreed Memorandum on the Commonwealth Secretariat 1965 (Cmnd 2713); Final Communiqué of the Commonwealth Prime Ministers' Meeting 1965 (Cmnd 2712) p 10. The Secretariat is accommodated in Marlborough House, Pall Mall, London SW1Y 5HX.

2 Commonwealth Secretariat Act 1966 s 1(1).

3 The Commonwealth Secretary General has access to Her Majesty's ministers and to the Prime Minister (see 830 HC Official Report (5th series), 8 February 1972, written answers col *345*) and to all Commonwealth heads of government.

4 For these purposes, 'United Kingdom' includes the Channel Islands and the Isle of Man: Commonwealth Secretariat Act 1966 Schedule para 10(3). As to the meaning of 'United Kingdom' generally see PARA 703 note 2.

5 Commonwealth Secretariat Act 1966 Schedule para 1(1)(a).

6 Commonwealth Secretariat Act 1966 Schedule para 2.

7 Commonwealth Secretariat Act 1966 Schedule para 3 (amended by the Local Government Finance Act 1988 Sch 12 Pt III para 39(1)).

8 Commonwealth Secretariat Act 1966 Schedule para 4. This exemption is subject to compliance with such conditions as the Commissioners for Revenue and Customs may prescribe: Schedule para 4 (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50). The Secretariat is entitled to the refund of customs duty paid by it on any hydrocarbon oil bought in the United Kingdom by the Secretariat and necessary for its official use: Diplomatic and other Privileges Act 1971 s 1(1) (amended by the Customs and Excise Management Act 1979 Sch 4 para 12, Table Pt I). See also PARA 724 note 2. As to the Commissioners for Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

9 Ie a country mentioned in the British Nationality Act 1981 Sch 3: see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11.

10 Commonwealth Secretariat Act 1966 Schedule para 5(1) (amended by the British Nationality Act 1981 Sch 7; the International Organisations Act 2005 s 3(a), Schedule). With effect from 6 April 2006, the officers and servants of the Secretariat are exempt from income tax in respect of salaries and emoluments received by them in that capacity: Commonwealth Secretariat Act 1966 Schedule para 5A(1), (2) (Schedule para 5A added by the International Organisations Act 2005 s 3(b)); International Organisations Act 2005 (Commencement) Order 2005, SI 2005/1870, art 3. This applies to senior officers of the Secretariat in place of any exemption from liability for income tax in respect of the salaries and emoluments received by them in that capacity to which they would otherwise be entitled under the Commonwealth Secretariat Act 1966 Schedule para 5(1), but does not apply to any pension or annuity paid by the Secretariat to any person who has ceased to be an officer or servant of the Secretariat: Schedule para 5A(3), (4) (as so added). Officers (not being senior officers) and servants who have the same citizenship and qualifications and are not ordinarily resident in the United Kingdom are entitled to exemption from duties on the importation of their personal and household effects on first taking up their posts: Schedule para 7 (amended by the British Nationality Act 1981 Sch 7).

11 Commonwealth Secretariat Act 1966 Schedule para 6 (amended by the International Organisations Act 2005 s 2(1), (3)(a)).

12 Commonwealth Secretariat Act 1966 Schedule para 8 (amended by the International Organisations Act 2005 s 2(1), (3)(b)). A certificate of the Secretary of State is conclusive evidence of any fact stated thereon relevant to the question whether or not any person is entitled to any privilege or immunity arising under the Schedule to the Commonwealth Secretariat Act 1966: Schedule para 9. As to the Secretary of State see PARA 708 note 4.

724. Representatives of members.

The High Commissioners of other members of the Commonwealth, together with their premises and the members of their diplomatic, administrative and technical and service staff and the private servants of members of their mission, enjoy in the United Kingdom the privileges and immunities provided for in the articles of the Vienna Convention on Diplomatic Relations in accordance with the Diplomatic Privileges Act 1964[1], in the same manner as other foreign diplomatic missions[2].

Persons employed as official agents[3] for any member, or for any state or province of a member, are entitled, if certified by the High Commissioner or Agent General for the relevant territory to be ordinarily resident outside the United Kingdom and resident in the United Kingdom solely for the performance of official duties, to the same immunity from income tax as the members of the staff of a mission under the Diplomatic Privileges Act 1964[4].

1 Diplomatic Privileges Act 1964 s 2(1), Sch 1. If a person is a citizen of a country listed in the Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670, Sch 1 (which lists the members of the Commonwealth and also includes Zimbabwe) and is also a British national, and is a member of a mission of a country listed in Sch 1 or is a private servant of such a member, then for the purposes of the Diplomatic Privileges Act 1964 Sch 1 art 38 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 274) the privileges and immunities admitted or granted by the receiving state must be construed in relation to that person as the privileges and immunities to which that person would be entitled under the Diplomatic Privileges Act 1964 if he were not a British national: Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670, art 2(1), (2). 'British national' means a person who under the British Nationality Act 1981 and the British Nationality (Falkland Islands) Act 1983 is a British citizen, a British overseas territories citizen or a British overseas citizen, or who is a British national (overseas) under the Hong Kong (British Nationality) Order 1986, SI 1986/948: Diplomatic Privileges (British Nationals) Order 1999, SI 1999/670, art 2(3) (amended by virtue of the British Overseas Territories Act 2002 s 2(3)). As to privileges and immunities under the Diplomatic Privileges Act 1964 see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 265 et seq.

2 Thus the provisions of the Diplomatic and other Privileges Act 1971 s 1 (see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 561) apply to Commonwealth High Commissions and the members of their diplomatic staff and members of their families in the same manner as to other foreign diplomatic missions and their diplomatic staff, so as to require the refund of customs duty paid on any hydrocarbon oil bought in the United Kingdom and used for the official use of the mission or for the personal use of the members of a mission's diplomatic staff and the members of their families forming part of their household: s 1(1) (amended by the Customs and Excise Management Act 1979 Sch 4 para 12, Table Pt I). As to restriction of such a privilege for lack of reciprocity see the Diplomatic Privileges Act 1964 s 3(1); the Diplomatic and other Privileges Act 1971 s 1(3); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 288. As to payment of duty under the Hydrocarbon Oil Duties Act 1979 see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) PARA 509 et seq.

3 Such an agent will have the immunity in question only if he is not employed in any trade, business or other undertaking carried on for the purposes of profit: Income Tax Act 2007 s 841(6).

4 See the Income Tax Act 2007 s 841; and **INCOME TAXATION** vol 23(2) (Reissue) para 1168.

725. Trade commissioners, Agents General etc.

The privileges, immunities and exemptions which are conferred by the Consular Relations Act 1968[1] on consular officers and members of their families, on consular employees and members of their families, on consular posts and the service staff of such posts and members of their families, on the private staff of members of a consular post, and on the residence of the career head of a consular post, respectively, are conferred on the corresponding officers, employees, posts, staff, families and residences in respect of: (1) the Representative of Nauru in London; (2) trade commissioners and assistant trade commissioners for any independent country within the Commonwealth; (3) migration officers for the Commonwealth of Australia; (4) Assistant High Commissioners for Bangladesh; (5) Assistant High Commissioners and Assistant Commissioners for India; (6) Agents General for the states of Australia; (7) Agents General for the provinces of Canada; (8) the Head of the Falkland Islands Government Representative in London; (9) the Head of the Cayman Islands Government Representative in London; (10) the Head of the Gibraltar Government Representative in London; (11) the Head of the Turks and Caicos Islands Government Representative in London; (12) the Head of the British Virgin Islands Government Representative in London; and (13) the Head of the Bermuda Government Representative in London[2]. Official agents of a state or province of such a country, if not ordinarily resident within the United Kingdom, are entitled while resident in the United Kingdom solely for the purposes of their employment as such agents (not being employment in connection with a trade, business or other undertaking for profit), to the same immunity from income tax as members of staff of a mission under the Diplomatic Privileges Act 1964[3]. Partial relief from general rates is afforded to the offices and residence of the representative in London of the the Falkland Islands Government, the Cayman Islands Government, the Gibraltar Government, the Turks and Caicos Islands Government, the British Virgin Islands Government and the Bermuda Government respectively[4].

1 See the Consular Relations Act 1968 s 1, Sch 1; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 290 et seq.

2 Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1985, SI 1985/1983, arts 3-8, Sch 1 (Sch 1 substituted by SI 2009/1741).

3 See the Income Tax Act 2007 s 841; and **INCOME TAXATION** vol 23(2) (Reissue) para 1168.

4 Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1985, SI 1985/1983, art 9 (substituted by SI 2009/1741).

(6) COUNTRIES FORMERLY DEPENDENT ON THE UNITED KINGDOM AND NOW OUTSIDE THE COMMONWEALTH

(i) Burma

726. Burma.

Most of the territories of Burma were part of His Majesty's dominions, the remainder being under the Crown's protection or suzerainty, when on 4 January 1948 it became an independent country, outside His Majesty's dominions and the Commonwealth[1].

1 Treaty of Recognition of Burmese Independence (17 October 1947 (TS No 16 (1948); Cmd 7360)); Burma Independence Act 1947 s 1(1), (2), (3) (repealed).

(ii) Hong Kong

727. Hong Kong.

The colony of Hong Kong was acquired by cession of the Emperor of China by the Treaty of Nanking in 1842. Part of the adjoining mainland (Kowloon) was ceded to the Crown and annexed to the colony in 1860; a further part (the New Territories) was leased to the Crown for 99 years in 1898 and for the term of the lease was treated as part and parcel of the colony.

Immediately before 1 July 1997, Hong Kong ceased to be part of Her Majesty's dominions and of the Commonwealth[1], becoming the Hong Kong Special Administrative Region of the People's Republic of China[2].

1 Hong Kong Act 1985 s 1, which came into force on the ratification, on 27 May 1985, of the Joint Declaration of the Governments of the United Kingdom and the People's Republic of China on the Question of Hong Kong dated 19 December 1984 (TS No 26 (1985); Cmnd 9543). See further the Hong Kong (Legislative Powers) Order 1986, SI 1986/1298 (lapsed); the Hong Kong (British Nationality) Order 1986, SI 1986/948; and the British Nationality (Hong Kong) Regulations 1986, SI 1986/2175. Decree No 26 of the President of the People's Republic of China dated 4 April 1990 promulgated, with effect from 1 July 1997, a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. See *R v Secretary of State for the Home Department, ex p Launder* [1997] 3 All ER 961, [1997] 1 WLR 839, HL.

2 The British Nationality (Hong Kong) Act 1997 provides for registration, on or after 1 July 1997, as British citizens of certain persons ordinarily resident in Hong Kong immediately before 4 February 1997. See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 34.

(iii) Ireland

728. The Republic of Ireland.

The state known before 18 April 1949 as Eire, which had occupied an equivocal and anomalous position within the Crown's dominions[1] and within the Commonwealth (regarding itself as being externally associated with the Commonwealth), seceded as from that date from His Majesty's dominions under the name of the Republic of Ireland[2] and simultaneously withdrew from the Commonwealth.

1 From 1921 to 1937 Eire was styled the Irish Free State, and under that name was one of the dominions specified in the Statute of Westminster 1931. In 1933 it abolished the oath of allegiance; in 1935 it purported to exclude its citizens from the definition of British subjects; in 1936 it abolished the office of Governor General; in 1937 it set up what was in effect a republican Constitution, in which the only reference to the Crown was in the Executive Authority (External Relations) Act 1936 (1936/58) (Eire) (repealed), which provided that so long as Eire was associated with the Commonwealth the Sovereign could act on its behalf and on the advice of its government for the appointment of diplomatic and consular representatives. None of these enactments was accepted by the United Kingdom as effecting a fundamental change in Eire's relations with the Commonwealth: see *Murray v Parkes*[1942] 2 KB 123, [1942] 1 All ER 558, DC.

2 Republic of Ireland Act 1948 (1948/22) (Eire). The Act came into force on 18 April 1949. For consequential provision see the Ireland Act 1949 s 1(1). The Republic is not a foreign country for the purpose of any law in force in the United Kingdom or its dependencies: s 2(1). Existing references to Her Majesty's dominions continue to apply to the Republic (s 3(2)), but communications of the incapacity of the Sovereign are not to be made to the government of the Republic, nor is the assent of the Parliament of the Republic required in respect of changes in the succession to the throne or the royal style and titles (s 3(3)). As to the position of Irish citizens regarding status as British citizens see generally **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 12, 67. As to the position of representatives of the Republic in the United Kingdom see PARAS 724-725.

(iv) Palestine

729. Palestine.

Palestine, including Transjordan, was a mandated territory in which the Crown acquired jurisdiction in 1919[1]. By treaty dated 22 March 1946, the Crown recognised Transjordan as a sovereign independent state as from 17 June 1946[2]. His Majesty's jurisdiction in Palestine was terminated by statute as from 15 May 1948[3].

1 See the Mandate for Palestine, approved on 24 July 1922 (Cmd 1785).

2 Treaty of Alliance between the United Kingdom and Transjordan (TS No 32 (1946); Cmd 6916).

3 Palestine Act 1948 s 1(1) (repealed).

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(v) Persian Gulf States

730. The Trucial States and other protected Persian Gulf states.

The Crown acquired jurisdiction in various territories in the Persian Gulf at various times as from 1889: Bahrain by 1892; Kuwait by 1899; Qatar by 1916; the Trucial States (Dubai, Sharjah, Ras al Khaimah, Ajman, Umm al Qaiwain, Abu Dhabi and Fujairah) by 1892. This jurisdiction was relinquished by agreement at various times as from 1961: in Bahrain as from 15 August 1971[1]; in Kuwait as from 19 June 1961[2]; in Qatar as from 3 September 1971[3]; and in the Trucial States as from 1 December 1971[4].

In 1891 the Crown acquired limited extra-territorial jurisdiction in Muscat; this was terminated by agreement as from 6 February 1958[5].

None of the Persian Gulf states was in practice considered part of the Commonwealth.

1 Termination of Special Treaty Relations between the United Kingdom and Bahrain, 15 August 1971 (TS No 78 (1971); Cmnd 4827); Bahrain Termination of Jurisdiction Regulation 1972 dated 15 February 1972 (Queen's Regulation No 4 of 1972) (Bahrain).

2 Exchange of Notes regarding relations with Kuwait, 19 June 1961 (TS No 93 (1961); Cmnd 1518; see further TS No 64 (1968); Cmnd 3720); Kuwait (Repealing) Order 1961, SI 1961/1001; Kuwait Transfer of Jurisdiction (No 2) Regulation 1961 dated 1 April 1961 (Queen's Regulation No 2 of 1961) (Kuwait).

3 Termination of Special Treaty Relations between the United Kingdom and Qatar, 3 September 1971 (TS No 3 (1972); Cmnd 4849); Qatar Termination of Jurisdiction Regulation 1972 dated 25 January 1972 (Queen's Regulation No 2 of 1972) (Qatar).

4 Termination of Special Treaty Relations between the United Kingdom and the Trucial States, 1 December 1971 (TS No 34 (1972); Cmnd 4941); Trucial States (Temporary Provisions) Order 1972, SI 1972/449; Trucial States Termination of Jurisdiction Regulation 1972 dated 18 March 1972 (Queen's Regulation No 7 of 1972) (Trucial States).

5 Supplementary List of Ratifications, Accessions, Withdrawals etc 1958 (TS No 61 (1958); Cmnd 642 p 27); Muscat Repealing Regulation 1958 dated 1 December 1958 (Queen's Regulation No 2 of 1958) (Muscat).

(vi) Somaliland

731. Somaliland.

Somaliland was a protectorate declared so to be in 1888. By proclamation Her Majesty terminated her protection and jurisdiction as from 26 June 1960[1]. Somaliland did not become a member of the Commonwealth and joined the Somali Republic on 1 July 1960.

1 Royal Proclamation dated 23 June 1960, SI 1960 III p 4102. A Constitution of Somaliland was provided by the Somaliland Order in Council 1960, SI 1960/1060, which came into force on 26 June 1960 and was superseded on 1 July 1960 on the accession of Somaliland to the Somali Republic.

(vii) South Arabia (South Yemen)

732. South Arabia.

Aden was a colony acquired by conquest in 1838 but administered, after 1947, under the British Settlements Acts 1887 and 1945. Perim and Kuria Muria Islands were acquired by conquest and cession respectively in 1857 and 1854. The islands known as Kamaran came under the protection of the Crown in 1915. The Protectorate of South Arabia came under the Crown's protection as from various times after 1839. In 1959 certain of the states within the Protectorate formed a Federation of South Arabia, to which Aden acceded in 1962 while remaining within Her Majesty's dominions.

On 30 November 1967, Perim and Kuria Muria Islands ceased to form part of Her Majesty's dominions[1]. Her Majesty's protection over the Protectorate of South Arabia, and her power and jurisdiction in Kamaran, were terminated at the same time[2]. At that date the Federation of South Arabia had in fact dissolved, and the successor state in the territories of Aden and South Arabia (save for Kuria Muria Islands which were ceded to Muscat and Oman[3]) styled itself the People's Republic of South Yemen. This state did not apply for admission to the Commonwealth.

1 Aden, Perim and Kuria Muria Islands Act 1967 (repealed). See also the South Arabia (Revocation) Order 1967, SI 1967/1763; and the Aden (Compensation and Retiring Benefits) Order 1967, SI 1967/1479. See further **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 20.

2 Proclamation terminating Her Majesty's protection over the protectorate of South Arabia dated 28 November 1967 (SI 1967 III p 5457); Proclamation terminating Her Majesty's power and jurisdiction in Kamaran dated 28 November 1967 (SI 1967 III p 5456).

3 Treaty of Cession of the Kuria Muria Islands, 15 November 1967 (TS No 8 (1968); Cmnd 3505).

(viii) Sudan

733. The Sudan.

An Anglo-Egyptian condominium was established over the Sudan in 1899. Self-government was granted in 1953 and independence as a republic outside the Commonwealth in 1956[1].

See the Agreement between the United Kingdom and the Egyptian Government, 12 February 1953 (TS No 47 (1953); Cmd 8904).

(ix) Zimbabwe

734. Zimbabwe.

The territory of Zimbabwe was acquired by conquest by the British South Africa Company in 1894 and was thereafter under the protection of the Crown until formal annexation in 1923 as the colony of Southern Rhodesia[1]. The status of Southern Rhodesia as a colony was not affected by its membership of the Federation of Rhodesia and Nyasaland between 1953 and 1963.

In the Southern Rhodesia Act 1965, the United Kingdom Parliament declared that Southern Rhodesia continued to be part of Her Majesty's dominions and that the government and Parliament of the United Kingdom had responsibility and jurisdiction as before for and in respect of it[2].

In 1980, Southern Rhodesia became independent as a republic under the name of Zimbabwe[3] and joined the Commonwealth. It withdrew from the Commonwealth on 7 December 2003[4].

1 See the Southern Rhodesia (Annexation) Order in Council 1923 (SR & O Rev 1948 XII p 369); *Re Southern Rhodesia*[1919] AC 211, PC; *Madzimbamuto v Lardner-Burke and George*[1969] 1 AC 645, [1968] 3 All ER 561, PC.

2 Southern Rhodesia Act 1965 s 1 (repealed).

3 The Southern Rhodesia Act 1979 empowered Her Majesty to provide a Constitution for Zimbabwe, and such a Constitution was provided by the Zimbabwe Constitution Order 1979, SI 1979/1600. See also the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order 1980, SI 1980/395 (spent); and the Zimbabwe Independence Order 1980, SI 1980/394. For consequential provisions see the Zimbabwe (Independence and Membership of the Commonwealth) (Consequential Provisions) Order 1980, SI 1980/701. The Zimbabwe Act 1979 s 3 provides that no criminal proceedings or proceedings in tort or for reparation may be instituted, continued or enforced in any United Kingdom court in respect of any of specified classes of acts, wherever done, in connection with or in consequence of the purported declaration of independence of Southern Rhodesia on 11 November 1965; see also the Southern Rhodesia (Legal Proceedings and Public Liabilities) Order 1979, SI 1979/160; the Southern Rhodesia (Sanctions) (Amnesty) Order 1980, SI 1980/565.

4 See PARA 701 note 11.

2. MEMBER COUNTRIES

(1) ANTIGUA AND BARBUDA

735. Antigua and Barbuda.

Antigua was acquired by settlement in 1632. Barbuda and Redonda were settled from Antigua later in the seventeenth century. The whole territory constituted one of the six original presidencies in the federated colony of the Leeward Islands established in 1871, and was part of the West Indies Federation from 1958 to 1962. Having become an associated state on 27 February 1967, its status of association with the United Kingdom was terminated, and Antigua and Barbuda became a fully responsible member of the Commonwealth, within Her Majesty's dominions, on 3 November 1981[1].

The Eastern Caribbean Supreme Court has original and appellate jurisdiction and appeal lies to the Privy Council[2].

1 Antigua Termination of Association Order 1981, SI 1981/1104 (lapsed). For consequential provisions see the Antigua and Barbuda Modification of Enactments Order 1981, SI 1981/1105 (lapsed). See also the Antigua and Barbuda Constitution Order 1981, SI 1981/1106, to which the Constitution is scheduled as Sch 1.

2 See the Constitution of Antigua and Barbuda s 122; the Antigua and Barbuda Appeals to Privy Council Order 1967, SI 1967/224 (retitled by SI 1981/1105; partially revoked by SI 2009/224).

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(2) AUSTRALIA

736. The Commonwealth of Australia.

All six Australian states were classed as settled colonies[1]. Out of the territory of the original colony of New South Wales, which had been acquired in 1770, were created Tasmania (Van Diemen's Land) in 1825, Victoria in 1851 and Queensland in 1859. Possession of South Australia was taken in 1836 and of Western Australia in 1829. Responsible government was granted to South Australia, Victoria, New South Wales and Tasmania in 1855 and 1856, to Queensland in 1859 and to Western Australia in 1891.

The Commonwealth of Australia Constitution Act (1900) empowered the Queen in Council to declare the colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia to be united in a federal Commonwealth[2] under the Crown of the United Kingdom[3] and enacted the Constitution of the Commonwealth of Australia[4].

The executive power of the Commonwealth, vested in the Queen, is exercisable by the Governor General[5]. Appointment and removal of state Governors is a matter for Her Majesty on the advice of the state Premier[6]. An Australian state and its organs are entitled to claim sovereign immunity in the United Kingdom courts[7].

When the Queen exercises functions under the Australian Constitution, she acts pursuant to Australian law and it is for Australian courts to determine whether her actions are lawful[8].

1 *Mabo v Queensland* (1992) 107 ALR 1 at 24-25, 58, Aust HC; *Coe v Commonwealth* (1979) 24 ALR 118, Aust HC; *Cooper v Stuart* (1889) 14 App Cas 286 at 291, PC.

2 Commonwealth of Australia Constitution Act (1900) s 3.

3 Commonwealth of Australia Constitution Act (1900) preamble, s 2. See PARA 714.

4 Commonwealth of Australia Constitution Act (1900) s 9. Besides the six states there are the Australian Capital Territory, the Northern Territory, Norfolk Island, and six other external territories: Ashmore and Cartier Islands, Australian Antarctic Territory, Heard and McDonald Islands, Cocos and Keeling Islands, Christmas Island in the Indian Ocean, and the Coral Sea Islands Territory.

5 Commonwealth of Australia Constitution Act (1900) ss 3, 9; Constitution of Australia s 61.

6 Australia Act 1986 s 7. Australian states are represented in London by Agents General (see PARA 725) but otherwise do not undertake diplomatic relations.

7 See *Mellenger v New Brunswick Development Corpn* [1971] 2 All ER 593, [1971] 1 WLR 604, CA, where it was held that a Canadian province is sovereign for purposes of immunity; this decision would apply all the more strongly to an Australian state.

8 See *Fitzgibbon v A-G* [2005] EWHC 114 (Ch), (2005) Times, 15 March, [2005] All ER (D) 127 (Feb).

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/2. MEMBER COUNTRIES/(2) AUSTRALIA/737. Judicature of Australia.

737. Judicature of Australia.

The High Court of Australia has both original jurisdiction, and final appellate jurisdiction in matters arising in state, federal and territorial jurisdiction[1]. Each state, under its own Constitution and laws, has a Supreme Court of general original and appellate jurisdiction. Parliament has established a Federal Court of Australia, and has conferred on state courts jurisdiction in most federal issues. No appeal may be brought from or in respect of any decision of an Australian court to the Judicial Committee of the Privy Council[2].

1 Commonwealth of Australia Constitution Act (1900) s 9; Constitution s 75.

2 Australia Act 1986 s 11(1).

(3) BAHAMAS

738. The Bahamas.

The Bahama Islands were a colony acquired by settlement in the seventeenth century. On 10 July 1973, the Bahamas attained fully responsible status as an independent member of the Commonwealth, remaining within Her Majesty's dominions[1].

Appeal lies to the Privy Council from any decision of the Court of Appeal in cases for the enforcement of the fundamental rights and freedoms[2]. In civil actions where the dispute involves more than the specified value, appeal lies as of right from the Court of Appeal to the Privy Council, and in other civil cases the Court of Appeal may grant leave to appeal; appeal by special leave of the Privy Council is retained[3].

1 Bahamas Independence Act 1973 s 1(1). According to s 6(1) the country is to be styled 'the Commonwealth of the Bahamas' or 'the Bahamas', but in the Bahamas Independence Order 1973, SI 1973/1080, it is styled 'The Commonwealth of The Bahamas' or 'The Bahamas'.

2 Constitution of The Bahamas art 104(2). The Constitution is set out in the Bahamas Independence Order 1973, SI 1973/1080, Schedule.

3 Constitution of The Bahamas art 105(1), (2); Court of Appeal Act (Rev Laws 1965 c 34) (Bahamas) s 18(1); and see the Bahamas (Procedure in Appeals to Privy Council) Order 1964, SI 1964/2042 (partially revoked by SI 2009/224).

(4) BANGLADESH

739. Bangladesh.

The People's Republic of Bangladesh is an independent republic within the Commonwealth. Its territory comprises the territories which constituted East Pakistan[1] until a date which for the purposes of the law of Bangladesh is 26 March 1971[2] and for the purposes of the law of the United Kingdom is 4 February 1972[3].

1 See PARA 770.

2 Constitution of Bangladesh dated 4 November 1972 (Bangladesh Gazette Extraordinary, 14 December 1972) (Bangladesh) (superseded) art 2.

3 Bangladesh Act 1973 s 1(4). On that date the United Kingdom government recognised Bangladesh. The Bangladesh Act 1973 provides that laws of the United Kingdom, Channel Islands and Isle of Man (and United Kingdom enactments extended to other territories) made before 23 March 1956 (when Pakistan became a republic) continue to have the same operation in relation to Bangladesh as if Bangladesh were part of those of Her Majesty's dominions which are not colonies: s 1(1), (2).

(5) BARBADOS

740. Barbados.

Barbados was a colony acquired by settlement between 1625 and 1627. It attained fully responsible status as an independent member of the Commonwealth on 30 November 1966[1], remaining within Her Majesty's dominions. Appeal to the Privy Council has, however, been abolished[2].

1 Barbados Independence Act 1966 s 1(1); Barbados Independence Order 1966, SI 1966/1455, art 1(2). The Constitution of Barbados is set out in the Barbados Independence Order 1966, SI 1966/1455, Schedule.

2 See the Caribbean Court of Justice Act 2003 (Barbados), whereby the appellate jurisdiction of the Caribbean Court of Justice replaces, from 16 April 2005 (the date of the inauguration of the Caribbean Court of Justice) the former appellate jurisdiction of the Privy Council. The text of the agreement establishing that court was accessible, at the date at which this title states the law, at www.caribbeancourtofjustice.org. It is also set out at (2001) 64 WIR 447. See also *R v Lewis (Mitchell)* [2007] CCJ 3 (AJ), (2007) 70 WIR 75 (meaning of 'appeal as of right' within the meaning of the Caribbean Court of Justice Act 2003 (Barbados) s 6).

(6) BELIZE

741. Belize.

The colony of Belize[1] was considered to have been acquired by settlement, becoming part of Her Majesty's dominions by 1817, at the latest[2]. Belize became independent within Her Majesty's dominions, and a member of the Commonwealth, on 21 September 1981[3]. Appeal from the Court of Appeal lies to the Privy Council as of right from final decisions involving a question as to the interpretation of the Constitution or other cases prescribed by the National Assembly, and otherwise with leave of the Court of Appeal in the usual classes of case[4].

1 Formerly known as British Honduras, but this name was changed as from 1 June 1973.

2 *A-G for British Honduras v Bristowe*(1880) 6 App Cas 143 at 148.

3 Belize Act 1981; Belize Independence Order 1981, SI 1981/1107 (spent).

4 See the Belize Constitution (1981/14) (Belize) s 104; and *Logan v R*[1996] AC 871, [1996] 4 All ER 190, PC.

(7) BOTSWANA

742. Botswana.

Botswana is an independent sovereign republic within the Commonwealth, established on 30 September 1966 when Her Majesty ceased to have jurisdiction over the territory[1] which had until then constituted the Bechuanaland Protectorate (a protectorate proclaimed on 30 September 1885)[2].

1 See the Botswana Independence Act 1966 s 1; the Botswana Independence Order 1966, SI 1966/1171, Sch 2.

2 See British and Foreign State Papers vol 76 p 986. In considering the operation of the law of the United Kingdom and dependencies in relation to Botswana and things and persons connected therewith (as to which see the Botswana Independence Act 1966 s 2), note that the territory of Botswana was never within Her Majesty's dominions.

(8) BRUNEI

743. Brunei.

Negara Brunei Darussalam (for short, Brunei Darussalam or Brunei) became a fully independent member of the Commonwealth on 31 December 1983[1]. It had been a protected state by treaty since 1888. Relations between Her Majesty and the Sultan of Brunei were regulated by agreements, subject to which Brunei enjoyed full internal self-government under a Constitution proclaimed by the Sultan on 29 September 1959.

The Supreme Court consists of a High Court and a Court of Appeal, from which in civil cases an appeal lies to the Sultan; by agreement between Her Majesty and the Sultan these appeals are heard by the Judicial Committee who report their opinion to the Sultan[2].

1 See the Brunei and Maldives Act 1985; and the British Nationality (Brunei) Order 1983, SI 1983/1699.

2 See the Brunei (Appeals) Act 1989 s 1(2); the Brunei (Appeals) Order 1989, SI 1989/2396 (partially revoked by SI 2009/224). See further **COURTS** vol 10 (Reissue) PARA 406.

(9) CAMEROON

744. Cameroon.

Southern Cameroons was a part of the territory of the Cameroons in which the Crown had jurisdiction from 1922 to 1946 under a League of Nations mandate and thereafter under a United Nations Trusteeship agreement. On 1 October 1961 the responsibility of Her Majesty's government in the United Kingdom for the administration of Southern Cameroons was terminated, and the territory became a part of the federal United Republic of Cameroon. The Republic of Cameroon became a member of the Commonwealth in November 1995[1].

1 See the British Nationality (Cameroon and Mozambique) Order 1998, SI 1998/3161. As to the forces of Cameroon see the Commonwealth Act 2002 Sch 2 (prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009).

(10) CANADA

745. Canada.

The ceded colonies of Nova Scotia, Prince Edward Island and New Brunswick received representative institutions in the eighteenth century. The conquered colony of Quebec was likewise granted representative government in 1763 but no assembly was ever summoned, and in 1774 a nominated Legislative Council was substituted. In 1791 Quebec was divided into two provinces of Upper and Lower Canada, each with a representative assembly; in 1840 the Canadas were reunited. Canada received responsible government in 1847, Nova Scotia and New Brunswick in 1848 and Prince Edward Island in 1851. It was the colonies of Canada (thereupon divided into the provinces of Ontario and Quebec), Nova Scotia and New Brunswick that were united by proclamation under the British North America Act 1867 to form the dominion of Canada.

Provision was made in 1867 for the admission of Rupert's Land and the North-Western Territory, and of Newfoundland, Prince Edward Island and British Columbia[1]. Rupert's Land and the North-Western Territory were admitted in 1870, and from Rupert's Land the province of Manitoba was created in the same year. British Columbia was admitted in 1871, and Prince Edward Island in 1873. The rest of the North American territory which was British (save Newfoundland) was conceded to Canada in 1880[2]. The provinces of Alberta and Saskatchewan were created in 1905 from the territories, after a period of representative government, and in 1912 most of the remaining territories except those in the far north[3] were allocated to Ontario, Quebec and Manitoba.

Newfoundland, which had voted against confederation in 1869, came to enjoy Dominion status[4] but did not conduct her own international relations. In 1933, under pressure of financial crisis, the legislature petitioned the King to suspend the Constitution and appoint commissioners to administer the government under United Kingdom supervision[5]. In 1949 Newfoundland (including Labrador[6]) became the tenth province of Canada[7].

1 Constitution Act 1867 (Can) s 146.

2 Order in Council dated 31 July 1880 (SR & O Rev 1948 III p 419).

3 Namely Northwest Territories, Yukon and, since 1 April 1999, Nunavut (formerly part of Northwest Territories).

4 Thus it was one of the Dominions named in the Statute of Westminster 1931 s 1. Sections 2-6 were left to be adopted by Newfoundland (see s 10); this adoption never took place.

5 See the Newfoundland Act 1933 (repealed).

6 *Re Boundary between Canada and Newfoundland in Labrador Peninsula* (1927) 137 LT 187, PC.

7 Newfoundland Act 1949 (Can).

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746. Government of Canada.

The executive power is vested in the Queen and is exercised on her behalf by the Governor General[1]. Each province has a Lieutenant Governor, appointed for a term of five years and removable, for cause assigned, by the Governor General in Council[2].

Each province is entitled to sovereign immunity in the courts of the United Kingdom[3].

1 Constitution Act 1867 (Can) ss 9, 10. As to the prerogative powers of the Governor General see PARA 718.

2 Constitution Act 1867 (Can) ss 58, 59. See also PARA 718.

3 *Mellenger v New Brunswick Development Corpn* [1971] 2 All ER 593, [1971] 1 WLR 604, CA. As to sovereign immunity from suit see PARA 717 note 13; and **INTERNATIONAL RELATIONS LAW**.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/2. MEMBER COUNTRIES/(10) CANADA/747. Judicature of Canada.

747. Judicature of Canada.

The Supreme Court of Canada is a court of appeal from the Federal Court and all the provincial and territorial courts of appeal or supreme courts. It has the duty of giving advisory opinions on important issues submitted, under statutory provisions for such references, by the Governor General in Council[1].

1 *A-G for Ontario v A-G for Canada* [1912] AC 571, PC. Appeals to the Judicial Committee of the Privy Council from Canada were terminated in 1947.

(11) REPUBLIC OF CYPRUS

748. Republic of Cyprus.

The Island of Cyprus was a colony acquired by conquest or cession as from 5 November 1914. Her Majesty ceased to have sovereignty or jurisdiction over the Island with the exception of the Sovereign Base Areas of Akrotiri and Dhekelia[1] when the Republic of Cyprus was established pursuant to the Cyprus Act 1960 on 16 August 1960[2]. The Republic of Cyprus was admitted to membership of the Commonwealth on 14 March 1961[3].

In addition to its membership of the Commonwealth, the Republic of Cyprus is a member state of the European Union[4].

1 Cyprus Act 1960 s 2(1). As to the Sovereign Base Areas see PARA 864. On events in Cyprus in and after 1963, and their bearing on the Republic of Cyprus, on the status (including the Commonwealth citizenship) of Turkish Cypriots, and on the purported Turkish republic of Northern Cyprus, see *Caglar v Billingham* [1996] 1 LRC 526 at 538, 564-581, sub nom *R v IRC, ex p Caglar*[1995] STC 741, (1995) 67 TC 335 (Income Tax, Special Commissioners). United Nations-led direct talks between the Republic of Cyprus and Northern Cyprus to reach a comprehensive settlement to the division of the island began in January 2002. See also note 4.

2 Cyprus Act 1960 s 1; Republic of Cyprus Order in Council 1960, SI 1960/1368, para 2.

3 In the law of the United Kingdom, it has been treated as a member of the Commonwealth since 16 August 1960: see the Cyprus Act 1960 s 3(1), (2), Schedule (which has been extensively amended).

4 The Republic of Cyprus became a member state on 1 May 2004: see the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ L236, 23.9.2003). As to the suspension of the application of Community and EU legislation in the northern area of the island see Protocol No 10 to that Treaty; and Case C-420/07*Apostolides v Orams*[2009] All ER (D) 89 (May), ECJ.

(12) DOMINICA

749. Dominica.

Dominica was acquired by conquest in 1759, as confirmed by the Treaty of Paris in 1763. A representative assembly was established in 1775. After 1871, Dominica was within the Federal Colony of the Leeward Islands until transferred as from 1 January 1940 to the Windward Islands. From 1958 to 1962 it was within the West Indies Federation, and from March 1967 it was an associated state under the West Indies Act 1967.

The status of association with the United Kingdom was terminated and Dominica ceased to form part of Her Majesty's dominions, though remaining a member of the Commonwealth, on 3 November 1978[1]. At Dominica's request, a new Constitution was provided for it as a sovereign democratic republic as from that date[2].

The Eastern Caribbean Supreme Court has jurisdiction in constitutional and other questions, with appeal to the Privy Council[3].

1 Dominica Termination of Association Order 1978, SI 1978/1031 (lapsed). See also the Dominica Modification of Enactments Order 1978, SI 1978/1030 (lapsed).

2 See the Commonwealth of Dominica Constitution Order 1978, SI 1978/1027, art 3, Sch 1 (amended by SI 1978/1521); the Commonwealth of Dominica Constitution Order (Amendment) Acts 1983 (1983/9) and 1984 (1984/22) (Dominica).

3 See the Constitution of the Commonwealth of Dominica ss 103-107; the Dominica Appeals to Judicial Committee Order, SI 1967/224, Schedule para 10 (Order retitled by SI 1978/1030; partially revoked by SI 2009/224).

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(13) FIJI ISLANDS

750. Fiji Islands.

Fiji acquired fully responsible status within the Commonwealth on 10 October 1970[1]. Its territories formerly constituted the colony of Fiji, having been ceded to the Crown by local chiefs[2] by deeds of cession dated 10 October 1874 and November 1879[3].

The independence Constitution was revoked by military decree with effect from 25 September 1987[4].

1 Fiji Independence Act 1970 s 1; Fiji Independence Order 1970 (SI 1970 III p 6630), to which the Constitution of Fiji was scheduled.

2 See *Robertson v Hemmings* (1876) 1 Fiji LR (Udal) 1 at 2-3 (Fiji).

3 See Fiji Rev Laws 1967 vol VI pp 3285, 3287; and see also p 3288 (Letters Patent dated 17 December 1880 for the annexation of Rotuma; and Proclamation of Annexation of Rotuma dated 5 November 1880).

4 The Commonwealth Heads of Government meeting in Vancouver stated on 16 October 1987 that, on the basis of established Commonwealth conventions, Fiji's membership lapsed with the emergence of a republic on 15 October 1987. Fiji was readmitted to the Commonwealth on 1 October 1997, after enactment on 25 July 1997 of the Constitution (Amendment) Act 1997, 13/1997 (Fiji), which, as amended by the Constitution (Amendment) Act 1998, 5/1998 (Fiji), made provision for the coming into force on 27 July 1998 of the Constitution of the Republic of the Fiji Islands. Subsequent constitutional matters are reviewed in *Qarase v Bainimarama* (Fiji Court of Appeal no ABU0077 of 2008S), 9 April 2009, Fiji Islands CA. At the date at which this volume states the law, Fiji was suspended from the councils of the Commonwealth pending the restoration of democracy. At a meeting of the Commonwealth Ministerial Action Group in London on 4 March 2009 it was decided that, should sufficient progress not take place, consistent with the benchmarks set out in the Pacific Islands Forum Leaders' Communiqué, Fiji would be fully suspended from the Commonwealth at the Group's next meeting in September 2009.

UPDATE

750 Fiji Islands.

NOTE 4--See *Qarase v Bainimarama* [2009] FJCA 9, [2009] 3 LRC 614 (validity of President's acts of ratification, decision to rule directly and to make and promulgate legislation and grant of immunity upheld).

(14) THE GAMBIA

751. The Gambia.

The Gambia consists of territories of which some were acquired by settlement or by cession to the Crown at various times between the mid-seventeenth century and the mid-nineteenth century, and others came under the protection of the Crown at various times especially between 1887 and 1901. As from 18 February 1965 all these became independent as The Gambia[1], a member of the Commonwealth[2], which became a republic within the Commonwealth on 24 April 1970[3].

1 The Gambia Independence Act 1964 s 1(1); The Gambia Independence Order 1965, SI 1965/135; The Gambia (Compensation and Retiring Benefits) Order 1965, SI 1965/136.

2 See The Gambia Independence Act 1964, long title and s 1(1), (2).

3 Republic of The Gambia Act 1970 s 1. Appeal to the Judicial Committee of the Privy Council was abolished as from 18 July 1998.

(15) GHANA

752. Ghana.

Ghana, which comprises the territories until then known as the Gold Coast[1], became an independent member of the Commonwealth on 6 March 1957[2]. On 1 July 1960 Ghana became a republic[3] within the Commonwealth.

1 These territories are those mentioned in the Gold Coast (Constitution) Order in Council 1954, SI 1954/551, s 1(1) (spent), and included territory acquired by settlement (the Gold Coast Colony), territory acquired by conquest (Ashanti), a protectorate (the Northern Territories) and a trust territory acquired as mandated territory in 1919 (Togoland).

2 Ghana Independence Act 1957 ss 1, 5(2).

3 See the Ghana (Consequential Provision) Act 1960 s 1(1).

(16) GRENADA

753. Grenada.

Grenada became an independent member of the Commonwealth within Her Majesty's dominions on 7 February 1974[1]. Grenada was acquired by cession in 1763, after conquest in 1762. From 1880 to 1962 Grenada was governed, with its own legislative and executive councils, as one of the colonies brought under a single Governor of the Windward Islands in 1880. Grenada was a member of the West Indies Federation from 1958 to 1962, and an associated state from 1967 to 1974.

The Eastern Caribbean Supreme Court has original and appellate jurisdiction[2].

On 13 March 1979 the Constitution was suspended by a revolutionary government which abolished appeals to the Privy Council. Towards the end of October 1983 that government's successors were overthrown by military intervention and the Governor General assumed the authority to restore the 1974 Constitution by a process which was completed by 4 December 1984[3] but did not include restoring the jurisdiction of the Privy Council[4]. That jurisdiction was restored as from 15 August 1991[5] but without retrospective application[6].

1 Grenada Termination of Association Order 1973, SI 1973/2157 (lapsed); Grenada Constitution Order 1973, SI 1973/2155 (lapsed). See also the Grenada Modification of Enactments Order 1973, SI 1973/2156 (lapsed).

2 The Eastern Caribbean Supreme Court was established as the West Indies Associated States Supreme Court by the West Indies Associated States Supreme Court Order 1967, SI 1927/223.

3 See the Constitution of Grenada Order 1984 (Gazette 57/1984) (Grenada). As to the legal effect of the 1979 usurpation, and of the Governor General's actions and proclamations in 1983, see *Mitchell v DPP* [1985] LRC (Const) 127, Grenada HC.

4 As to the effect of the People's Laws, Interim Government Proclamations and Ordinances, Confirmation of Validity Act 1987 (1987/16) (Grenada), confirming the abrogation of the jurisdiction of the Privy Council, see *Mitchell v DPP*[1986] AC 73, PC.

5 Constitutional Judicature (Restoration) Act 1991 (Grenada).

6 Constitutional Judicature (Restoration) Act 1991 (Grenada) s 7(4); *Coard v A-G of Grenada*[2007] UKPC 7, [2007] 3 LRC 679.

(17) GUYANA

754. Guyana.

Guyana is an independent republic within the Commonwealth. Its territory constituted the colony of British Guiana, which was acquired either by conquest in 1803 or by cession by Holland in 1814, and became fully responsible as a member of the Commonwealth within Her Majesty's dominions on 26 May 1966[1], under the name of Guyana. Guyana became a republic on 2 February 1970[2].

1 Guyana Independence Act 1966 s 1(1); Guyana Independence Order 1966, SI 1966/575, Sch 2.

2 See the Guyana Republic Act 1970 s 1. The final court of appeal is now the Caribbean Court of Justice: see the Caribbean Court of Justice Act 2004 (2004/16) (Guyana) and associated legislation. See also *Yasseen v A-G of Guyana* [2008] CCJ 3 (AJ), (2008) 72 WIR 317 (meaning of 'appeal as of right' within the Caribbean Court of Justice Act 2004 (2004/16) (Guyana) s 6). That court has jurisdiction to grant leave to appeal as a poor person upon a fresh application to the court; but this is a residual power which the court will only exercise when necessary to eliminate a real risk of a miscarriage of justice occurring: *Ross v Sinclair* [2008] CCJ 4 (AJ), (2008) 72 WIR 282.

(18) INDIA

755. India.

India, or Bharat, is a Union of states, of which there are now 27; there are also several Union territories. On 15 August 1947 the United Kingdom government ceased to have responsibility for any of the territories in British India, and the suzerainty of the Crown over the princely Indian states outside British India lapsed, together with all treaties and agreements between the Crown and their rulers[1]. The Constitution of India came fully into force on 26 January 1950[2].

1 Indian Independence Act 1947 s 7(1).

2 Constitution of India art 394. The Indian Independence Act 1947, a formal source of the Constituent Assembly's authority (s 8(1) (repealed)), is repealed in India by the Constitution of India art 395. The right of appeal to the Privy Council was abolished by the Abolition of Privy Council Jurisdiction Act 1949 (India). The Indian Independence Act 1947 ss 1, 6(4), (5), 7, 15, 18(1), 20, remain in force in English law. The India (Consequential Provision) Act 1949 s 1 (repealed in part) preserved in force all laws of England relating to India which were in existence at the date when the republic came into existence (ie 26 January 1950): see *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All ER 1060, DC. See also PARAS 707 note 8, 721 note 4.

(19) JAMAICA

756. Jamaica.

Jamaica was a colony acquired, probably by conquest, in 1655. It attained fully responsible status within the Commonwealth and Her Majesty's dominions on 6 August 1962[1].

Appeal lies from the Court of Appeal to the Privy Council in the usual classes of case[2]. Appeal by special leave of Her Majesty is retained[3], but is no longer to be regarded as a matter of the prerogative, may be abrogated by ordinary legislation, and has been so abrogated in relation to habeas corpus in criminal causes or matters[4].

1 Jamaica Independence Act 1962 s 1(1); Jamaica (Constitution) Order in Council 1962, SI 1962/1550, art 3(1), Sch 2.

2 See the Constitution of Jamaica s 110(1)(a)-(c); *Frater v R* [1981] 1 WLR 1468, PC; the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, SI 1962/1650 (partially revoked by SI 2009/224). Jamaica has enacted legislation (the Judicature (Appellate Jurisdiction) (Amendment) Act 2004 (Jamaica), the Caribbean Court of Justice (Constitutional Amendment) Act 2004 (Jamaica) and the Caribbean Court of Justice Act 2004 (Jamaica)) purporting to replace the appellate jurisdiction of the Privy Council with that of the Caribbean Court of Justice, but that legislation, while not formally repealed at the date at which this volume states the law, has been declared void under the Constitution of Jamaica s 2 in so far as it purported to abolish the right of appeal to the Privy Council because it was passed by the ordinary legislative procedure and was thus inconsistent with the Constitution which entrenches the right of appeal in certain cases: see *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356, [2005] 2 LRC 840.

3 Constitution of Jamaica s 110(3).

4 *Grant v R*[2004] UKPC 27, [2004] 2 AC 550, [2005] 1 LRC 256.

(20) KENYA

757. Kenya.

The territories which before 12 December 1963 comprised the colony and protectorate[1] of Kenya became on that day the territories of Kenya, a fully responsible member of the Commonwealth within Her Majesty's dominions[2]. On 12 December 1964 Kenya became a republic within the Commonwealth[3].

1 The Kenya protectorate was ceded to Kenya on that day by the Sultan of Zanzibar under the terms of an Agreement dated 8 October 1963 (Cmnd 2161). Her Majesty's jurisdiction in the protectorate had been acquired in and after 1890; the colony was annexed to the dominions of the Crown in 1920, but may be regarded as having been acquired by settlement between 1897 and 1906.

2 Kenya Independence Act 1963 s 1(1), (3).

3 See the Kenya Republic Act 1965 s 1(1).

(21) KIRIBATI

758. Kiribati.

The colony of the Gilbert and Ellice Islands was acquired by cession of the native governments with effect from 12 January 1916[1]. The boundaries of the colony were extended from time to time under the Colonial Boundaries Act 1895. On 1 October 1975 the colony was divided into two separate colonies, so that the Ellice Islands became the Colony of Tuvalu, and the remaining islands the Colony of the Gilbert Islands. On 12 July 1979 the Gilbert Islands became an independent member of the Commonwealth as a republic under the name of Kiribati[2].

Appeal lies to the Privy Council only in respect of questions as to an infringement of the Constitution whereby the constitutional rights of any Banaban or of the Rabi Council are or are likely to be infringed[3].

1 See the Gilbert and Ellice Islands Order in Council 1915 dated 10 November 1915 (SR & O Rev 1948 IX p 655) (revoked).

2 Kiribati Act 1979 s 1; Kiribati Independence Order 1979, SI 1979/719, to which the Constitution of Kiribati was scheduled. Schedule 2 to the Constitution specifies the territory of Kiribati as comprising Banaba (Ocean Island) (as to whose former status see *Tito v Waddell (No 2)*[1977] Ch 106 at 129-132, [1977] 3 All ER 129 at 148-150), the sixteen Gilbert Islands, the eight Phoenix Islands, and eight of the eleven Line Islands. Kiribati is pronounced 'Kiribass': see Cmnd 7445 p 6n.

3 Constitution of Kiribati s 123; Kiribati Appeals to Judicial Committee Order 1979, SI 1979/720 (partially revoked by SI 2009/224).

(22) LESOTHO

759. Lesotho.

Lesotho is an independent kingdom within the Commonwealth, established on 4 October 1966 when the colony of Basutoland (a territory annexed to the colony of the Cape of Good Hope in 1871 and constituted a separate colony in 1884[1]) ceased to be part of Her Majesty's dominions[2].

1 See Order in Council dated 2 February 1884 (SR & O Rev 1948 III p 79) (revoked).

2 Lesotho Independence Act 1966 s 1; Lesotho Independence Order 1966, SI 1966/1172.

(23) MALAWI

760. Malawi.

Malawi became a member of the Commonwealth on 6 July 1964 when the Nyasaland protectorate (over which the Crown had acquired jurisdiction between 1889 and 1904) attained fully responsible status within Her Majesty's dominions[1]. Malawi became a republic on 6 July 1966[2].

1 Malawi Independence Act 1964 s 1(1). The constitutional status of these territories had not been affected in essentials by the membership of Nyasaland in the Federation of Rhodesia and Nyasaland between 1953 and 1963.

2 See the Malawi Republic Act 1966.

(24) MALAYSIA

761. Malaysia.

Malaysia, an independent monarchy, is a federation comprising the Federal Territories[1], the 11 states of Malaya[2] and the states[3] of Sabah (formerly North Borneo) and Sarawak. Nine of the states of Malaya[4] were protected states which had entered into treaties of protection with Great Britain at various times between 1874 and 1914 (and four of which had formed themselves into the Federated Malay States[5] in 1895); the other two states of Malaya, namely Penang and Malacca, were colonies acquired by cession between 1786 and 1824. These 11 states became independent on 31 August 1957 under the Federation of Malaya Independence Act 1957, which provided for their formation into a new independent Federation of Malaya as a sovereign country within the Commonwealth and outside Her Majesty's dominions[6]. Sabah and Sarawak were both protected states from 1888 until 1946, when each became a colony by cession. Both these Borneo states ceased to be part of Her Majesty's dominions on 16 September 1963, when (together with Singapore) they federated with the then existing states of the Federation of Malaya, under the provisions of the Malaysia Act 1963[7], so as to form Malaysia. Singapore is now an independent sovereign state separate from Malaysia[8].

The jurisdiction of the Judicial Committee of the Privy Council was abolished as from 1 January 1985.

1 Ie Kuala Lumpur, Labuan and Putrajaya.

2 Ie Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu. These states are together known as West Malaysia.

3 These states are also known as East Malaysia.

4 Ie those mentioned in note 2, with the omission of Malacca and Penang.

5 Ie Perak, Pahang, Negeri Sembilan and Selangor.

6 Federation of Malaya Independence Act 1957 s 1(1), (2); Federation of Malaya Independence Order in Council 1957, SI 1957/1533, Sch 1 art 1(1).

7 Malaysia Act 1963 s 1(1).

8 See PARA 778.

(25) MALDIVES

762. Maldives.

The Maldive Islands were a protected state in which the Crown acquired jurisdiction by 1887. This jurisdiction was terminated by agreement as from 26 July 1965[1], and The Maldives thereafter remained outside the Commonwealth until becoming, as an independent republic, a special member on 9 July 1982, and a full member on 20 June 1985[2].

1 Treaty between the United Kingdom and the Maldive Islands, 26 July 1965 (TS No 68 (1965), Cmnd 2749).

2 See the Brunei and Maldives Act 1985.

(26) MALTA

763. Malta.

Malta was a colony acquired by cession by the people of Malta in 1802, confirmed by the Treaty of Paris in 1814. It attained fully responsible status within the Commonwealth and Her Majesty's dominions on 21 September 1964[1]. On 13 December 1974 Malta ceased to be part of Her Majesty's dominions and became a republic[2].

In addition to its membership of the Commonwealth, Malta is a member state of the European Union[3].

1 Malta Independence Act 1964 s 1(1); Malta Independence Order 1964 s 2. A Constitution of Malta was scheduled to the Malta Independence Order 1964, and has been subsequently amended. All forms of appeal to the Privy Council were abolished as from 18 November 1972.

2 See the Malta Republic Act 1975.

3 Malta became a member state of the European Union on 1 May 2004: see the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ L236, 23.9.2003).

(27) MAURITIUS

764. Mauritius.

Mauritius[1] was a colony acquired by cession from France in 1814 by the Treaty of Paris, after capture by British forces in 1810. It attained fully responsible status within the Commonwealth and Her Majesty's dominions on 12 March 1968[2]. As from 12 March 1992 Mauritius ceased to be part of Her Majesty's dominions and became the Republic of Mauritius[3].

1 Mauritius comprises the Island of Mauritius (together with the small islands adjacent thereto) and the Dependencies of Mauritius (consisting of the island of Rodrigues and the Lesser Dependencies): see the Mauritius Independence Act 1968 s 5(1); and the Mauritius Letters Patent 1947 (SR & O Rev 1948 XIII p 271) (revoked).

2 Mauritius Independence Act 1968 s 1(1).

3 The Mauritius Republic Act 1992, deemed to have had effect from 12 March 1992 (s 1(4)), makes consequential provision as to the law of the United Kingdom (see s 1) and for the authorisation of appeals from Mauritius to the Judicial Committee of the Privy Council (see s 2). See the Constitution of the Republic of Mauritius s 81; the Mauritius Appeals to Judicial Committee Order 1992, SI 1992/1716.

(28) MOZAMBIQUE

765. Mozambique.

Formerly Portuguese East Africa, Mozambique became independent on 25 June 1975, and, although it had never had any prior juridical connection with any member of the Commonwealth, it became a member of the Commonwealth in November 1995[1].

1 For consequential provision as to the forces of Mozambique see the Commonwealth Act 2002 Sch 2 (prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009).

(29) NAMIBIA

766. Namibia.

South West Africa was never within Her Majesty's dominions or protection save in so far as it was administered by the Union of South Africa between its capture from Germany in 1915 and the establishment of a League of Nations mandate, under the administration of South Africa, on 1 January 1921. The territory attained independence, under the name Namibia and as a member of the Commonwealth, on 21 March 1990[1].

1 See the Namibia Act 1991 s 1, deemed to have come into force on 21 March 1990: s 2(2).

(30) NAURU

767. Nauru.

Nauru became mandated to the British Empire by virtue of the Treaty of Versailles 1919, after occupation by Australian forces in 1914. Its administration was provided for under an agreement dated 2 July 1919 between the governments of the United Kingdom, the Commonwealth of Australia and New Zealand; in practice the island was administered as an external territory of the Commonwealth of Australia. In 1947 a trusteeship agreement between the three governments mentioned above was approved by the United Nations. The trusteeship was terminated by the United Nations on 31 January 1968, on which date the Commonwealth of Australia ceased to be responsible for the government of Nauru[1] and Nauru became first a special member and subsequently a full member of the Commonwealth.

1 Nauru Independence Act 1967 (1967/103) (Aust) ss 2(2), 4(1), (2), which came into force on 31 January 1968. See further the Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act 1980. See also *Detudamo v Deireragea* [1987] LRC (Const) 164 at 167-169, Nauru SC.

(31) NEW ZEALAND

768. New Zealand.

Sovereignty in New Zealand was acquired by 1840[1].

The boundaries of New Zealand, fixed by statute in 1863[2], have been extended by the annexation of the Kermadec Islands in 1887[3], of the Cook Islands (then including Niue[4]) in 1901[5], and of the Tokelau or Union Islands (ceded to the Crown in 1916 and placed under the administration of New Zealand in 1926) in 1948[6]. In 1923 a group of uninhabited Antarctic territories was declared to be a British settlement under the name of the Ross Dependency and was placed under the authority of the Governor General of New Zealand[7].

Until 1947 the powers of the New Zealand Parliament were limited not only by the usual restrictions upon the competence of colonial legislatures[8] but also, it was thought, by special qualifications attached to its powers of constitutional amendment[9]. By virtue of the adoption in 1947 of provisions of the Statute of Westminster 1931[10], followed by the conferment by the United Kingdom Parliament of full constituent powers[11], it acquired unlimited legislative competence.

No appeal lies, or may be brought, to the Judicial Committee of the Privy Council from or in respect of any civil or criminal decision of a New Zealand court made after 31 December 2003[12]. The Supreme Court of New Zealand has been established as the court of final appeal for New Zealand[13].

1 By Letters Patent of 15 June 1839 and proclamation of 14 January 1840, the boundaries of the colony of New South Wales had been extended to include any territory in New Zealand which was or might be acquired in sovereignty by Her Majesty, but by Letters Patent of 16 November 1840 New Zealand was constituted a separate colony. In law, New Zealand was a settled colony.

2 New Zealand Boundaries Act 1863 (repealed).

3 Letters Patent dated 18 January 1887 (SR & O Rev 1948 XVI p 861); Kermadec Islands Act 1887 (1887/1) (NZ) s 2. The validity of the annexation may perhaps rest on the Colonial Boundaries Act 1895 s 1(1).

4 The Cook Islands then included Niue, which attained self-government in 1974 in free association with New Zealand, which continues to have responsibility for external affairs and defence: see the Niue Constitution Act 1974 (1974/42) (NZ), which came into force on 19 October 1974.

5 Order in Council dated 13 May 1901, SR & O 1901/531. The Cook Islands came under British protection between 1888 and 1902 and were annexed to New Zealand on 11 June 1901. They became self-governing on 4 August 1965: see the Cook Islands Constitution Act 1964 (1964/69) (NZ). There is a limited right of appeal from the High Court of the Cook Islands to the High Court of New Zealand (see the Constitution of the Cook Islands art 61) but no further appeal to the Court of Appeal of New Zealand (art 63). The Constitution makes no provision for appeals to the Privy Council; it was held prior to self-government that appeal lay to the Privy Council only by special leave of the Judicial Committee: see *Nelson v Braisby (No 3)* [1934] NZLR 636, NZ HC.

6 Union Islands (Revocation) Order in Council 1948 (SR & O Rev 1948 XVI p 866); Tokelau Act 1948 (1948/24) (NZ). Since 1 January 1949 the Tokelau Islands (Fakaofo, Nukunonu and Atafu) have formed part of New Zealand: Tokelau Act 1948 (1948/24) (NZ) s 3 (ss 3, 6 amended by the Tokelau Amendment Act 1976 (NZ) s 3(1)(c)). But the statute law of New Zealand is not in force there unless expressly extended: Tokelau Act 1948 (1948/24) (NZ) s 6 (as so amended).

7 Order in Council dated 30 July 1923, SR & O 1923/974.

8 See PARAS 827-829.

9 New Zealand Constitution (Amendment) Act 1857 s 2 (repealed).

10 Ie the Statute of Westminster 1931 ss 2-6 (see PARA 720), which did not apply to New Zealand until adopted by New Zealand by the Statute of Westminster Adoption Act 1947 (1947/38) (NZ) s 2 (repealed), on 25 November 1947.

11 New Zealand Constitution (Amendment) Act 1947 s 1 (repealed), which also repealed the New Zealand Constitution (Amendment) Act 1857 and in effect superseded the Statute of Westminster 1931 s 8. The Constitution Act 1986 (1986/114) (NZ) provides that no Act of the United Kingdom Parliament passed after the commencement of that Act is to extend to New Zealand as part of its law; and that the Statute of Westminster 1931 and the New Zealand Constitution (Amendment) Act 1947 (repealed) cease to have effect in New Zealand law: see the Constitution Act 1986 (1986/114) (NZ) s 26(1).

12 Supreme Court Act 2003 (2003/53) (NZ) s 42(1). For transitional provisions see s 50. These provisions do not affect rights of appeal from the Cook Islands or Niue.

13 Supreme Court Act 2003 (2003/53) (NZ) s 6.

(32) NIGERIA

769. Nigeria.

A portion of the Federal Republic of Nigeria was formerly a colony acquired by cession in 1861; most of the remainder was a protectorate over which jurisdiction had been acquired by the Crown at various times between 1885 and 1904. The colony and protectorate attained independence and fully responsible status, within the Commonwealth and as part of Her Majesty's dominions, on 1 October 1960[1]. On 1 June 1961 the Northern Cameroons, a territory administered by the Crown under a mandate from 1922 to 1946 and then as a trust territory, was incorporated into the Federation of Nigeria[2]. On 1 October 1963, the whole territory of Nigeria ceased to be part of Her Majesty's dominions[3]. There are now 36 states and a Federal Capital Territory within the Federal Republic.

1 Nigeria Independence Act 1960 s 1(1). This Act ceased to be part of the law of Nigeria on 1 October 1963: Constitution of the Federal Republic of Nigeria 1963 (Act 1963/20) (Nigeria) (superseded) s 154.

2 See the Northern Cameroons (Administration) (Amendment) Order in Council 1961, SI 1961/998. For the mandate see Cmd 1794 (1922); for the trusteeship agreement see Cmd 7082 (1946).

3 Constitution of the Federal Republic of Nigeria 1963 (Nigeria) (superseded). See also the Nigeria Republic Act 1963 s 1(1), (2).

(33) PAKISTAN

770. Pakistan.

Pakistan was established as an independent dominion as from 15 August 1947[1]. Pakistan became a republic and ceased to be a part of Her Majesty's dominions on 23 March 1956, while remaining a member of the Commonwealth[2]. On 30 January 1972 Pakistan withdrew from the Commonwealth[3]. On 1 October 1989 Pakistan was readmitted to the Commonwealth[4].

1 Indian Independence Act 1947 s 1(1).

2 See the Pakistan (Consequential Provision) Act 1956 (repealed).

3 See the Pakistan Act 1973 preamble (repealed). Most of the consequential changes in the law of the United Kingdom took effect as from 1 September 1973: s 6(4).

4 See the Pakistan Act 1990 s 2(3). The Act repeals the Pakistan Acts 1973 and 1974 (see the Pakistan Act 1990 s 2(2)) and makes other consequential provision (see s 1, Schedule (amended by the Commonwealth Act 2002 Sch 3; prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009). It is deemed to have come into force on 1 October 1989: Pakistan Act 1990 s 2(3). See also the British Nationality (Pakistan) Order 1989, SI 1989/1331.

(34) PAPUA NEW GUINEA

771. Papua New Guinea.

Papua became a protectorate (known as British New Guinea) on 6 November 1884 and a colony on 4 September 1888. In 1902 it was placed under the authority of the Commonwealth of Australia, and Australian administration of the territory, known as Papua, commenced on 1 September 1906. New Guinea, a former German protectorate, was administered by the Commonwealth of Australia as a mandated territory under the League of Nations from 1921, and after 1947 as a trust territory. After 1949 the territories were governed as an administrative union which came to be described as Papua New Guinea.

Papua New Guinea became independent, and a member of the Commonwealth, on 16 September 1975[1]. The Queen is head of state[2]; the Governor General is appointed by the Queen in accordance with the advice of the National Executive Council given in accordance with a decision of the Parliament by secret ballot[3], and is removable in accordance with a decision of either the National Executive Council or the Parliament[4].

1 Papua New Guinea Independence Act 1975 (1975/78) (Aust). See also the Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act 1980, declaring (see s 1(2)) that Papua New Guinea was never a colony within the meaning of the British Nationality Act 1948.

2 Constitution of the Independent State of Papua New Guinea (PNG) s 82.

3 Constitution of the Independent State of Papua New Guinea (PNG) s 88.

4 Constitution of the Independent State of Papua New Guinea (PNG) s 93.

(35) ST CHRISTOPHER ('ST KITTS') AND NEVIS

772. St Christopher ('St Kitts') and Nevis.

St Christopher was settled in 1623, though British possession of the island was finally conceded by France only in 1713 under the Treaty of Utrecht. Nevis was settled in 1628. Representative assemblies were summoned in the seventeenth century. St Christopher and Nevis (together with Anguilla) were united by an Act of the Leeward Islands Federation in 1883. They were a member of the West Indies Federation from 1958 to 1962, and an associated state from 1967 to 1983. The status of association with the United Kingdom was terminated, and St Christopher and Nevis (or 'St Kitts and Nevis') became an independent member of the Commonwealth within Her Majesty's dominions, on 19 September 1983[1].

The Eastern Caribbean Supreme Court has original and appellate jurisdiction, with appeal from the Court of Appeal to the Privy Council[2].

1 St Christopher and Nevis Termination of Association Order 1983, SI 1983/880 (lapsed). Relevant enactments were accordingly modified: St Christopher and Nevis Modification of Enactments Order 1983, SI 1983/882 (lapsed). The Constitution is set out in the St Christopher and Nevis Constitution Order 1983, SI 1983/881, Sch 1.

2 See the Constitution of St Christopher and Nevis ss 96-99; the St Christopher and Nevis Constitution Order 1983, SI 1983/881, Sch 2 paras 7, 8; the St Christopher and Nevis Appeals to Privy Council Order 1967, SI 1967/224 (retitled by SI 1983/882; partially revoked by SI 2009/224). Where legislation provides that no appeal lies to the Court of Appeal from a decision of the High Court, the Privy Council has no jurisdiction to hear an appeal by special leave or otherwise: *A-G for St Christopher and Nevis v Rodionov* [2004] UKPC 38, [2004] 1 WLR 2796, [2004] 5 LRC 694.

(36) ST LUCIA

773. St Lucia.

St Lucia was acquired finally by conquest in 1803, confirmed by formal cession to the Crown by France by the Treaty of Paris in 1814. The Crown retained prerogative constituent power, and occasionally legislated for the island by Order in Council even after the establishment of a legislative council. St Lucia was governed, with its own legislative and executive councils, as one of the colonies brought under a single Governor of the Windward Islands in 1880, and was a member of the West Indies Federation from 1958 to 1962, and an associated state from 1967 until it became an independent member of the Commonwealth, within Her Majesty's dominions, on 22 February 1979[1].

The Eastern Caribbean Supreme Court has appellate jurisdiction, with further appeal thence to the Privy Council[2].

1 St Lucia Termination of Association Order 1978, SI 1978/1900 (lapsed). Relevant enactments are modified by the St Lucia Modification of Enactments Order 1978, SI 1978/1899 (lapsed). The Constitution is set out in the St Lucia Constitution Order 1978, SI 1978/1981, Sch 1.

2 See the Constitution of St Lucia ss 105-108, 124(3); the St Lucia Constitution Order 1978, SI 1978/1981, Sch 2 paras 7, 8; the St Lucia Appeals to Privy Council Order 1967, SI 1967/224 (retitled by SI 1978/1899; partially revoked by SI 2009/224). The headquarters of the Eastern Caribbean Supreme Court are located in Castries, St Lucia.

(37) ST VINCENT AND THE GRENADINES

774. St Vincent and the Grenadines.

St Vincent was acquired by conquest in 1762, as confirmed by the Treaty of Paris in 1763. A legislative body was summoned in 1767, but terminated its existence and surrendered its functions to Her Majesty in Council in 1876[1]. St Vincent (with its dependencies) was governed, with its own legislative and executive councils, as one of the colonies brought under a single Governor of the Windward Islands in 1880, and was a member of the West Indies Federation from 1958 to 1962 and an associated state from 1967 until it became independent, within Her Majesty's dominions, on 27 October 1979[2]. St Vincent and the Grenadines became a special member of the Commonwealth in 1979 and a full member on 20 June 1985.

The Eastern Caribbean Supreme Court has original and appellate jurisdiction, with further appeal thence to the Privy Council[3].

1 See the St Vincent and Grenada Constitution Act 1876 ss 2, 3, Schedule (repealed).

2 St Vincent Termination of Association Order 1979, SI 1979/918 (lapsed). Relevant enactments were modified by the St Vincent Modification of Enactments Order 1979, SI 1979/917 (lapsed). The Constitution is set out in the St Vincent Constitution Order 1979, SI 1979/916, Sch 1.

3 See the Constitution of St Vincent and the Grenadines ss 96-99, 105(3); the St Vincent Constitution Order 1979, SI 1979/916, Sch 2 para 8; the St Vincent Appeals to Privy Council Order 1967, SI 1967/224 (retitled by SI 1979/917; partially revoked by SI 2009/224).

(38) SAMOA

775. Samoa.

Western Samoa was mandated to New Zealand by the League of Nations in 1919 after its occupation by New Zealand forces in 1914. As from 1946 New Zealand administered the territory under a trusteeship agreement approved by the General Assembly of the United Nations[1]. This agreement terminated on 1 January 1962, when Her Majesty in right of New Zealand ceased to have jurisdiction in Western Samoa, which became a fully independent sovereign state outside the Commonwealth under the name of the Independent State of Western Samoa, having a Constitution adopted by a local constitutional convention[2].

In August 1970 Western Samoa became a member of the Commonwealth. In 1980 its citizens became for purposes of English law Commonwealth citizens and the country acquired the status of a Commonwealth country for the purposes of many enactments which define that status by listing the countries concerned[3]. Western Samoa changed its name to Samoa in 1997.

1 As to the United Nations see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 520 et seq.

2 Western Samoa Act 1961 (1961/68) (NZ), preamble, ss 3, 4.

3 Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act 1980 s 1(1) (repealed), s 3, Schedule (amended by the Merchant Shipping Act 1995 Sch 12; the Statute Law (Repeals) Act 1998; the Commonwealth Act 2002 Sch 3; prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009).

(39) SEYCHELLES

776. Seychelles.

The colony of Seychelles[1] was acquired from the King of France in 1814 by cession. The islands were administered as dependencies of Mauritius until created a separate colony in 1903. The Crown retained its constituent and legislative authority until Seychelles became an independent republic within the Commonwealth on 29 June 1976[2].

1 The islands comprising the colony were specified in the first Schedule to the Seychelles Order 1970 dated 30 September 1970 (SI 1970 III p 6728) (revoked).

2 Seychelles Act 1976 s 1(1). On that date the Aldabra Group, Desroches and Farquhar Islands (which had been removed from the colony in 1965 to become part of the British Indian Ocean Territory: see PARA 856) reverted to Seychelles: British Indian Ocean Territory Order 1976, SI 1976/893, art 14 (revoked). See further the Constitution (Amendment of List of Seychelles Islands) Proclamation 1982, SI 1982/4 (Seychelles). A Constitution was provided by the Seychelles Independence Order 1976, SI 1976/894, Sch 1 (superseded).

(40) SIERRA LEONE

777. Sierra Leone.

The territory of Sierra Leone[1] was in part a colony acquired by settlement in 1787 and in part a protectorate proclaimed in 1896[2]; the whole territory attained fully responsible status within the Commonwealth, and as part of Her Majesty's dominions, on 27 April 1961[3].

Sierra Leone ceased to be part of Her Majesty's dominions on 19 April 1971[4].

1 The territory of Sierra Leone is defined in the Sierra Leone Independence Act 1961 Sch 1.

2 See *Buck v A-G* [1965] Ch 745, [1964] 2 All ER 663; affd [1965] Ch 745, [1965] 1 All ER 882, CA.

3 Sierra Leone Independence Act 1961 s 1(1); Sierra Leone (Constitution) Order in Council 1961, SI 1961/741, Sch 2, Constitution (superseded).

4 See the Sierra Leone Republic Act 1972 s 1(1), (2).

(41) SINGAPORE

778. Singapore.

Singapore's territories were formerly the colony of Singapore, which was acquired by cession in 1824. After 1826 the territory was administered as part of the Straits Settlements, first by the East India Company and then, from 1866, by the Crown. In 1958 the territory, while remaining a colony, became the State of Singapore, with internal self-government and separate citizenship[1]. Singapore ceased to be part of Her Majesty's dominions on 16 September 1963, when (together with North Borneo and Sarawak) it federated with the then existing States of the Federation of Malaya, under the provisions of the Malaysia Act 1963, so as to form part of Malaysia[2]. On 9 August 1965 Singapore became an independent sovereign state separate from and independent of Malaysia, and a full member of the Commonwealth[3].

1 See the State of Singapore Act 1958 s 1(1) (repealed). See also the Singapore Act 1966 s 1(2), Schedule para 1 (repealed).

2 Malaysia Act 1963 s 1(1).

3 Constitution of Malaysia (Singapore Amendment) Act 1965 (1965/53) (Malaysia); Republic of Singapore Independence Act 1965 (1965/9) (Singapore). For consequential provisions see the Singapore Act 1966. Appeals to the Judicial Committee of the Privy Council (for which provision was made by s 2) were abolished as from 8 April 1994.

(42) SOLOMON ISLANDS

779. Solomon Islands.

The British Solomon Islands protectorate came within Her Majesty's protection and jurisdiction by proclamations made from time to time between 1893 and 1900. The Solomon Islands became an independent member of the Commonwealth, within Her Majesty's dominions, on 7 July 1978[1].

1 Solomon Islands Act 1978 s 1(1), (2), which also makes consequential provision. There is no provision for appeals to the Judicial Committee of the Privy Council.

(43) SOUTH AFRICA

780. South Africa.

On 31 May 1961 the Union of South Africa, which was one of the dominions specified in the Statute of Westminster 1931, became a republic under the name of the Republic of South Africa and ceased to be a member of the Commonwealth[1].

On 1 June 1994, the Republic of South Africa, having replaced and repealed its former constitutional arrangements in 1993, was readmitted to the Commonwealth[2]; it is a federal union with nine provinces.

1 See the South Africa Act 1962.

2 See the South Africa Act 1995 s 1, Schedule (amended by the Commonwealth Act 2002 Sch 3; prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009).

(44) SRI LANKA

781. Sri Lanka.

The name of the country was changed from Ceylon to Sri Lanka on 22 May 1972 and on that date the country ceased to be part of Her Majesty's dominions[1]. Ceylon was a colony, acquired by conquest in 1796, as confirmed by cession in the Treaty of Amiens in 1802 and extended to the remainder of the Island in 1815. On 4 February 1948 Ceylon attained fully responsible status as an independent member of the Commonwealth[2].

The Constitution provided by the Ceylon Constitution and Independence Orders in Council 1946 and 1947 was superseded by a Constitution dated 22 May 1972, adopted by a Constituent Assembly and establishing a republic under the name of Sri Lanka as from that date. A new Constitution was adopted in 1978, which has been frequently amended.

1 See the Sri Lanka Republic Act 1972.

2 Ceylon Independence Act 1947 s 1 (now amended by the Sri Lanka Republic Act 1972 s 1(4)). The jurisdiction of the Privy Council in respect of Ceylon was abolished in 1971.

(45) SWAZILAND

782. Swaziland.

Swaziland is an independent kingdom which attained fully responsible status within the Commonwealth on 6 September 1968[1], when it ceased to be a protectorate or protected state[2]. The jurisdiction of the Crown, which ceased on that date, was originally acquired in 1900 when the Crown, by virtue of the conquest and annexation of the Transvaal, took over the protection and jurisdiction exercised by the former South African Republic over Swaziland.

1 Swaziland Independence Act 1968 s 1; Swaziland Independence Order 1968, SI 1968/1377; Swaziland (Compensation and Retiring Benefits) Order 1968, SI 1968/1376.

2 Swaziland is best regarded as having been a protectorate before it became independent, and was listed as a protectorate in eg the British Protectorates, Protected States and Protected Persons Order 1965, SI 1965/1864, Sch 2 (revoked). But it was described as 'a protected state' in the Swaziland Independence Act 1968 s 1.

(46) TANZANIA

783. Tanzania.

The United Republic of Tanzania is an independent sovereign republic formed by the union on 26 April 1964 of Tanganyika and Zanzibar.

Tanganyika was placed under British mandate in 1919, and became a trust territory in 1946. On 9 December 1961 Tanganyika became part of Her Majesty's dominions as a fully responsible and independent member of the Commonwealth[1]. On 9 December 1962 Tanganyika became a republic within the Commonwealth[2].

Zanzibar was a protected state (though commonly described as a protectorate) in which Her Majesty acquired jurisdiction by agreement with the Sultan of Zanzibar in 1890. On 10 December 1963 the Crown's jurisdiction in Zanzibar terminated and Zanzibar became an independent state within the Commonwealth[3].

Articles of Union between Tanganyika and Zanzibar came into force to establish the Union of Tanganyika and Zanzibar on 26 April 1964[4]. The name United Republic of Tanzania was adopted as from 29 October 1964.

1 Tanganyika Independence Act 1961 s 1(1).

2 See the Tanganyika Republic Act 1962.

3 Zanzibar Act 1963 s 1(1). In considering the operation of the law of the United Kingdom and dependencies in relation to Zanzibar and things and persons connected with it (as to which see also the Tanzania Act 1969), note that Zanzibar was never within Her Majesty's dominions: see also PARA 720 note 20.

4 See the Tanzania Act 1969.

(47) TONGA

784. Tonga.

The Kingdom of Tonga became a protected state in 1900. Tonga ceased to be a protected state, and became an independent monarchy within the Commonwealth, on 4 June 1970 pursuant to an Exchange of Letters dated 19 May 1970[1].

1 See the Exchange of Letters dated 19 May 1970 (Cmnd 4490), and the consequential provisions in the Tonga Act 1970 ss 1, 2 (s 2 repealed). In considering the law of the United Kingdom and dependencies in relation to Tonga and things and persons connected with it, note that Tonga was never within Her Majesty's dominions: see also PARA 720 note 20. The Constitution of Tonga was first granted by the King of Tonga in 1875.

(48) TRINIDAD AND TOBAGO

785. Trinidad and Tobago.

Trinidad was a colony acquired by conquest in 1797, or possibly by cession by France in 1802; Tobago was a colony acquired by conquest in 1803, or possibly by cession by France in 1814; the two colonies were amalgamated in 1889. On 31 August 1962 Trinidad and Tobago acquired fully responsible status as a member of the Commonwealth, remaining within Her Majesty's dominions[1]. It ceased to be a part of Her Majesty's dominions, and became a republic within the Commonwealth, on 1 August 1976[2].

On becoming a republic, Trinidad and Tobago made arrangements for the continuation of appeals to the Judicial Committee of the Privy Council[3].

1 Trinidad and Tobago Independence Act 1962 s 1(1), (2); Trinidad and Tobago (Constitution) Order in Council 1962, SI 1962/1875, Sch 2 (superseded).

2 See the Trinidad and Tobago Republic Act 1976.

3 As to the right of appeal to the Privy Council see the Constitution of the Republic of Trinidad and Tobago s 109; the Trinidad and Tobago Republic Act 1976 s 2 (amended by the Statute Law (Repeals) Act 1986); the Trinidad and Tobago Appeals to Judicial Committee Order 1976, SI 1976/1915 (partially revoked by SI 2009/224).

(49) TUVALU

786. Tuvalu.

The Ellice Islands were proclaimed a British protectorate in 1892, and by agreement of cession by the native governments were annexed as part of the new colony of the Gilbert and Ellice Islands with effect from 12 January 1916[1]. On 1 October 1975 they became the colony of Tuvalu[2], which on 1 October 1978 became independent as a special member of the Commonwealth[3].

From the High Court appeal lies to the Court of Appeal of Tuvalu[4], and thence to the Privy Council[5].

1 See the Gilbert and Ellice Islands Order in Council 1915 dated 10 November 1915 (SR & O Rev 1948 IX p 655) (revoked); and see PARA 758.

2 Tuvalu Order in Council 1975 dated 17 September 1975 (SI 1975 III p 8487) (revoked).

3 Tuvalu Act 1978 s 1. For consequential provision see s 4 (amended by the Interpretation Act 1978 Sch 3; prospectively amended by the Armed Forces Act 2006 Sch 17, as from 31 October 2009). A Constitution of Tuvalu (superseded) was scheduled to the Tuvalu Independence Order 1978 dated 25 July 1978 (SI 1978 II p 3781).

4 Constitution of Tuvalu s 135.

5 Constitution of Tuvalu s 136; Tuvalu (Appeals to Privy Council) Order 1975, SI 1975/1507 (partially revoked by SI 2009/224).

(50) UGANDA

787. Uganda.

The territory of Uganda was a protectorate in which Her Majesty had acquired jurisdiction principally by agreements concluded in 1894 and 1896, the boundaries of the territory being settled in 1914[1]. On 9 October 1962 the whole territory became part of Her Majesty's dominions under the name of Uganda and acquired fully responsible and independent status within the Commonwealth[2]. On 9 October 1963 Uganda ceased to be part of Her Majesty's dominions[3].

1 See *Katikiro of Buganda v A-G*[1960] 3 All ER 849 at 852-853, [1961] 1 WLR 119 at 123, PC.

2 Uganda Independence Act 1962 s 1(1), (2).

3 See the Uganda Act 1964.

(51) VANUATU

788. Vanuatu.

The Condominium of the New Hebrides had, for purposes of British law, the characteristics of a protectorate or protected state. On 30 July 1980, the New Hebrides became, under the name of Vanuatu, a sovereign state and independent member of the Commonwealth[1].

1 New Hebrides Order 1980, SI 1980/1079 (lapsed); Exchange of Notes between the United Kingdom and France dated 23 October 1979 (Cmnd 7808; TS No 17 (1980)), in which the independence Constitution (now revised) was provided. For consequential provision see the New Hebrides Act 1980.

(52) ZAMBIA

789. Zambia.

The territory of Zambia was formerly the protectorate of Northern Rhodesia, in which Her Majesty acquired jurisdiction under concessions and undertakings of protection at various times between 1891 and 1900, but which was administered under charters and Orders in Council by the British South Africa Company until the Crown assumed the administration in 1924. The status of Northern Rhodesia as a protectorate was not affected by its membership of the Federation of Rhodesia and Nyasaland between 1953 and 1963[1]. On 24 October 1964 the territory became an independent republic within the Commonwealth under the name of Zambia[2].

1 See the Rhodesia and Nyasaland Federation Act 1953 s 1 (repealed); the Rhodesia and Nyasaland Act 1963.

2 Zambia Independence Act 1964 s 1. For consequential provisions see s 2, Sch 1 (Sch 1 amended by the International Organisations Act 1981 Schedule; the Copyright, Designs and Patents Act 1988 Sch 8; the Commonwealth Act 2002 Sch 3; prospectively repealed by the Armed Forces Act 2006 Sch 17, as from 31 October 2009). See also the Zambia Independence Order 1964, SI 1964/1652; and the Zambia (Compensation and Retiring Benefits) Order 1964, SI 1964/1653. In considering the operation of the law of the United Kingdom and dependencies in relation to Zambia and things and persons connected with it, note that the territory of Zambia was never within Her Majesty's dominions.

3. CROWN DEPENDENCIES

(1) THE CHANNEL ISLANDS

790. Constitutional status of the Channel Islands.

The Channel Islands (like the Isle of Man) occupy an anomalous position, for they are neither parts of the United Kingdom[1] nor colonies[2]. The United Kingdom, the Isle of Man and the Channel Islands together make up the British Islands[3]. Citizens of the Channel Islands are British citizens[4]. In respect of the Channel Islands, the Crown acts through Her Majesty's Privy Council, on the recommendation of ministers of the United Kingdom government in their capacity as Privy Councillors[5].

The United Kingdom government is internationally responsible for the external affairs of the Channel Islands[6] in substantially the same way as for those of British overseas territories. The treaties establishing the European Communities apply to the Channel Islands only for certain purposes[7]. The English common law does not extend to the Channel Islands, in which the law is based on the *Grand Coutumier de Normandie* compiled in the Channel Islands in the thirteenth century[8], very largely changed by local customs[9] as well as by local legislation. But the prerogative writ of habeas corpus runs to the islands[10].

1 *Jersey Fishermen's Association v States of Guernsey*[2007] UKPC 30, [2008] 1 LRC 198, [2007] All ER (D) 39 (May); and see *Navigators and General Insurance Co Ltd v Ringrose*[1962] 1 All ER 97, [1962] 1 WLR 173, CA (Channel Islands not within meaning of 'United Kingdom' in insurance policy); *R v Pender* (19 May 1969, unreported), Winchester Assizes, cited in *R v Doot*[1973] QB 73, [1972] 2 All ER 1046, CA (Channel Islands are 'abroad' for purposes of jurisdiction of English courts); *Rover International Ltd v Cannon Film Sales Ltd (No 2)* [1987] 3 All ER 986, [1987] 1 WLR 1597 (Channel Islands 'beyond the seas' for the purposes of the Civil Evidence Act 1968 s 8(2) (repealed); revsd (1988) Financial Times, 10 June, CA); contrast *Stoneham v Ocean, Railway and General Accident Insurance Co*(1887) 19 QBD 237.

2 See the Interpretation Act 1978 s 5, Sch 1 sv 'British Islands' and 'colony'. See also the Colonial Laws Validity Act 1865 s 1; the British Nationality Act 1948 s 33(1) (amended by the British Nationality Act 1981 Sch 9); and PARA 705. They are, however, British possessions: Interpretation Act 1978 Sch 1 sv 'British possession'; and see PARA 703.

3 Interpretation Act 1978 Sch 1; and see PARA 705 note 2.

4 British Nationality Act 1981 ss 1, 11, 50(1) (s 1 amended by the Adoption (Intercountry Aspects) Act 1999 s 7; the British Overseas Territories Act 2002 s 5, Sch 1 para 1; the Adoption and Children Act 2002 ss 137(3), (4), 139(3), Sch 5). See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**. Although the rights enjoyed by citizens of the Channel Islands and the Isle of Man in the United Kingdom are not affected by the accession of the United Kingdom to the European Communities, a citizen of the Channel Islands or of the Isle of Man does not (unless he, a parent or a grandparent was born, adopted, naturalised or registered in the United Kingdom) benefit from Community provisions relating to the free movement of persons and services: see the Act of Accession (1972) (TS 16 (1979); Cmnd 5179, 7461) Protocol 3, arts 2, 6. In view of the exceptional constitutional relationship between Jersey and the United Kingdom, a complaint that the lack of any right of a Jersey resident to vote in elections for the United Kingdom Parliament is a breach of art 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (free elections) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**) is manifestly ill-founded: Application 8873/80 *X v United Kingdom* 28 DR 99 (1982), EComHR.

5 All Acts and Petitions from the Islands are referred to the Privy Council Committee for the Affairs of Jersey and Guernsey: General Order of Reference, Order in Council dated 22 February 1952. Such General Orders of Reference are ordinarily made at the beginning of each reign. The Secretary of State for Justice is the Privy Councillor with responsibility for the Channel Islands. As to the constitutional relationship between the United

Kingdom and the Islands see *Jersey Fishermen's Association v States of Guernsey*[2007] UKPC 30, [2008] 1 LRC 198, [2007] All ER (D) 39 (May); the Report of the Royal Commission on the Constitution 1969-1973 Pt XI, especially paras 1361-1363; and see also the submission of the United Kingdom government in Application 8873/80 *X v United Kingdom* 28 DR 99 (1982), EComHR.

6 *Hotchkiss v Channel Islands Knitwear* (unreported) 2001/207 (Jersey CA) (Carey, Bailiff of Guernsey). The preamble to the States of Jersey Law 2005 (L 8/2005) (Jersey), approved by the Privy Council, recites that it is recognised that Jersey has autonomous capacity in domestic affairs and that there is an increasing need for Jersey to participate in matters of international affairs.

7 See the Act of Accession (1972) (TS 16 (1979); Cmnd 5179, 7461) arts 25-27.

8 *Jersey Fishermen's Association v States of Guernsey*[2007] UKPC 30 at [30], [2008] 1 LRC 198 at [30], [2007] All ER (D) 39 (May). In relation to Guernsey, the basic form of customary law is comprised of those elements of the Grand Coutumier that were approved by Order in Council dated 27 October 1583 and known as L'Approbation des Lois.

9 As to the nature of this customary law as the common law (of the island in question) see *Snell v Beadle*[2001] UKPC 5, [2001] 2 AC 304; *Janvrin v De La Mare* (1861) 14 Moo PCC 334. It was not legitimate to introduce English feudal practice on the theory that Channel Islands feudalism was of the same type (*A-G v Symonds* (1830) 1 Knapp 390); and it is clear that the common law of real property is inapplicable (*De Carteret v Baudains*(1886) 11 App Cas 214, PC).

10 *Anon* (1681) 1 Vent 357; *R v Overton* (1668) 1 Sid 386; *R v Salmon* (1669) 2 Keb 450; *R v Cowle* (1759) 2 Burr 834 at 856; *Dodd's Case* (1858) 2 De G & J 510; *Ex p Anderson* (1861) 3 E & E 487 at 494; Le Cras *Laws of Jersey* 17 et seq. See also **ADMINISTRATIVE LAW**.

UPDATE

790 Constitutional status of the Channel Islands.

TEXT AND NOTES 1-6--See also *R (on the application of Barclay) v Secretary of State for Justice*[2009] UKSC 9 at [9]-[10], [2009] 3 WLR 1270 at [9]-[10], [2009] All ER (D) 15 (Dec).

791. Legislation for the Channel Islands.

Although Her Majesty's sovereignty over the Channel Islands is not now to be regarded as in right of the Duchy of Normandy[1], their special position as dependencies of the Crown, neither parts nor overseas territories of the United Kingdom, is undoubted and royal grants of autonomous government have been respected by the Parliament of the United Kingdom.

Although they are not represented in the United Kingdom Parliament, the Islands' proximity to the United Kingdom has made it expedient to extend to them a rather wider variety of Acts than is requisite in the case of British overseas territories[2], though it is very unusual to legislate on purely local issues by this means[3]. Acts of Parliament applicable to the Islands are sent to the Royal Courts of Jersey and Guernsey for registration. The function of legislating for matters purely domestic to the Islands is in practice left to the local legislative bodies and it seems to be a convention that Parliament will not tax the Islands. However, the right of Parliament to legislate is paramount; suspension of registration on a claim of inconsistency with the rights of the Islands is invalid, and, registration or no registration, Her Majesty's subjects and others in the Islands are bound by law to take notice of any Acts of Parliament extending to the Islands as part of their law[4].

The Queen in Council also legislates by Orders in Council, which likewise are sent for registration by the Royal Courts. Such Orders in Council may be made either: (1) under the royal prerogative[5], in which case registration, if objected to, can perhaps be ordered by the Queen in Council, although the Queen will be advised not to insist on registration if there is doubt as to the consistency of the Order with the rights of the Islands[6]; or (2) under the authority of statute, in which case the Order in Council should doubtless be accorded the same force and effect in the Islands as an Act of Parliament; or (3) by way of sanctioning a *projet de loi* approved by the legislature of one or other of the jurisdictions in the Channel Islands, in which case (if not also in the other two) the enactment may have extra-territorial effect to the full extent warranted by a sufficiently substantial relationship in its nature and effect with the peace, order and good government of the relevant jurisdiction[7].

1 *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [5], [2009] 2 WLR 1205 at [5], [2008] All ER (D) 32 (Dec); cf *Minquiers and Ecréhos Case* (1953) ICJ at 27-48, especially 46 (Memorial of the United Kingdom), and 498-514 (Reply of the United Kingdom); see also the petitions and cases in *Re Jersey States* (1853) 9 Moo PCC 185; and the Commission on the Constitution, Minutes of Evidence VI (1973) pp 7, 13, 227-234.

2 For the purpose of ascertaining the application of United Kingdom laws there, the Channel Islands are comprehended within the expressions 'British Islands' and 'British possession': Interpretation Act 1978 ss 5, 22, 23, Sch 1, Sch 2 Pt I para 4(1) (s 22 amended by the Legislative and Regulatory Reform Act 2006 s 25(2); the Interpretation Act 1978 Sch 2 Pt I para 4(1) amended by the Family Law Reform Act 1987 Sch 2 para 74, Sch 3 para 1, Sch 4; the Health Authorities Act 1995 Sch 3); and see PARAS 706 note 1, 703.

3 For a special case see the Alderney (Transfer of Property, etc) Act 1923.

4 This was laid down with special reference to His Majesty's subjects by Order in Council dated 7 May 1806, in response to protests against the power of Parliament. See Le Cras *Laws, Privileges, and Customs of the Island of Jersey* (1839) p 70. But a law passed by the legislature of any of the Channel Islands, if expressed to be passed or made in the implementation of the Treaties of accession of the United Kingdom to the European Communities and of the obligations of the United Kingdom thereafter, will not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of the United Kingdom Parliament (whether passed or to be passed) extending to the Island (other than the European Communities Act 1972 s 2), nor by reason of its having some operation outside the Island: s 2(6).

5 The Court of Appeal (Channel Islands) Order 1949 dated 31 May 1949 (revoked) was made under the prerogative. The Crown may exercise its prerogative of mercy without registration: *Re Daniel* (1891) 8 State Tr NS 314n.

6 *Re Jersey States* (1853) 9 Moo PCC 185 at 262, 8 St Tr (NS) 285 at 313. Thus, though the Code of 1771 allows the Royal Court to suspend registration of an Order considered to be contrary to the charters and privileges or burdensome to the Island until the pleasure of the Crown be taken (Recueil des Lois de Jersey 1771-1881 (1969) p 4), there is no lawful alternative if the Crown does not give way but to register the Order: Report of Commissioners into the State of the Civil and Ecclesiastical Laws of Jersey 1861; *Re Jersey States* (1853) 9 Moo PCC 185 at 262-263, 8 St Tr (NS) 285 at 314.

7 *Jersey Fishermen's Association v States of Guernsey* [2007] UKPC 30, [2008] 1 LRC 198, [2007] All ER (D) 39 (May).

UPDATE

791 Legislation for the Channel Islands

NOTE 1--*Barclay*, cited, affirmed: [2009] UKSC 9 at [9]-[10], [2009] 3 WLR 1270 at [9]-[10], [2009] All ER (D) 15 (Dec) (decisions of the Privy Council or of its Committee for the Affairs of Jersey and Guernsey are subject to judicial review, see at [100]).

792. The two Bailiwicks.

The Channel Islands comprise two Bailiwicks: (1) Jersey (including the islets and reefs of Les Minquiers and Les Ecréhos); and (2) Guernsey (including the island of Herm and the islets of Jethou and Lihou)[1], Alderney and Sark. Each Bailiwick has a Lieutenant Governor appointed by the Crown. The Crown also appoints for each Bailiwick a Bailiff, who as chief judge and president of the Royal Court, president of the Court of Appeal and speaker of the States is the civic head of the Island[2].

1 Herm, Jethou and Lihou have no Constitutions and are dependencies of Guernsey; legislative provisions of Guernsey may be deemed to include them: *Martyn v McCullock* (1837) 1 Moo PCC 308. Laws and ordinances of the States of Guernsey may be extended to Herm: Island of Herm Law 1946 (Guernsey) art 2. For the purposes of the Reform (Guernsey) Law 1948 (Guernsey), the islands of Herm and Jethou are deemed to be part of the parish of St Peter Port: art 48.

2 On the extent of the compatibility of this plurality of offices and functions of the Bailiff see Application 28488/95 *McGonnell v United Kingdom* (2000) 8 BHRC 56, [2000] ECHR 28488/95, ECt HR; *(on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [59]-[62], [69], [2009] 2 WLR 1205 at [59]-[62], [69], [2008] All ER (D) 32 (Dec). In each Bailiwick the Crown also appoints the Deputy Bailiff, the two law officers and one or more other officers. The salaries for all these officers are paid by the Islands. Sums paid into the Exchequer in respect of Crown revenues accruing in the Islands are repaid to the States: Jersey and Guernsey (Financial Provisions) Act 1947 s 1 (amended by the Statute Law Revision Act 1963).

UPDATE

792 The two Bailiwicks

NOTE 2--*Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

793. Constitution of Jersey.

Only the States have legislative power, the Royal Court having been deprived in 1771 of the power to pass ordinances. The States now consist of the Bailiff or Deputy Bailiff (who presides), the Lieutenant Governor, the Attorney General, the Solicitor General and the Dean of Jersey, the constable of each of the 12 parishes ex officio, 12 elected senators and 29 elected deputies; any member may speak but only elected members may vote[1].

There are two forms of legislative activity of the States. They have power to enact, repeal and amend provisional laws (regulations) having force for three years without the necessity of the royal assent; such ordinances must not infringe the royal prerogative and must not be repugnant to the permanent political or fundamental laws of the island. They can renew the laws from time to time if they relate to subjects of a purely municipal and administrative nature[2]. These laws, and laws of a more fundamental character, have permanent validity if assented to by Her Majesty in Council.

To administer the government of Jersey, the States appoint a Chief Minister and a Council of Ministers nominated by the Chief Minister. The European Convention on Human Rights[3] has been given effect in terms similar to the Human Rights Act 1998[4].

1 States of Jersey Law 2005 (L 8/2005) (Jersey) art 2.

2 See Orders in Council dated 28 March 1771 (Recueil des Lois de Jersey 1771-1881 (1969) p 1) and 14 April 1884 (Recueil des Lois de Jersey 1882-1928 (1963) p 46).

3 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

4 Human Rights (Jersey) Law 2000 (Jersey).

794. Judicature of Jersey.

The Royal Court[1] is presided over by the Bailiff, Deputy Bailiff, or a Commissioner, and sits either as the Inferior Number (when it consists of the Bailiff, or the Deputy Bailiff, and two jurats), or as the Superior Number (when it consists of the Bailiff, the Deputy Bailiff and not fewer than five from among the jurats appointed by an electoral college). The Inferior Number may refer any matter before it to the Superior Number[2], which exercises also a criminal appellate jurisdiction[3]. In cases tried before the Criminal Assizes the Bailiff is assisted by the *Grand enquéte*, a jury of 24; the accused will be acquitted if not fewer than nine find him not guilty.

There is a Court of Appeal, consisting of the Bailiff, the Deputy Bailiff and not fewer than one other person[4]. Appeal lies from the Court of Appeal to the Judicial Committee of the Privy Council[5]. Appeal lies in criminal cases only by special leave[6].

1 See the Royal Court (Jersey) Law 1948 (Jersey), with subsequent amendments.

2 Royal Court (Jersey) Law 1948 (Jersey) art 18.

3 Court of Appeal (Jersey) Law 1961 (Jersey) Pt 3 (arts 22-44).

4 Court of Appeal (Jersey) Law 1961 (Jersey) arts 2, 9(1). Such other persons are appointed by the Crown as ordinary judges of the Court of Appeal, holding office during good behaviour; they must have held judicial office in the Commonwealth or have been at least ten years in practice at the Bar in Jersey or in England and Wales, Scotland, Northern Ireland, Guernsey or the Isle of Man: Court of Appeal (Jersey) Law 1961 (Jersey) arts 2, 3.

5 Appeals from Jersey are regulated primarily by Order in Council dated 19 May 1671 (SR & O Rev 1948 XI p 341). See also Order in Council dated 15 July 1835 (SR & O Rev 1948 XI p 347); and the Court of Appeal (Jersey) Law 1961 (Jersey) art 14 (substituted by the Court of Appeal (Amendment No 8) (Jersey) Law 2008 (Jersey) art 7).

6 *Renouf v A-G for Jersey* [1936] AC 445, [1936] 1 All ER 936, PC.

795. Constitution of Guernsey.

The constitution of the executive branch of government in Guernsey is similar to that obtaining in Jersey[1].

The States of Deliberation consist of the Bailiff or Deputy Bailiff (who is president), the Attorney General (Procureur) and the Solicitor General (Comptroller) (who each may speak but may not vote), elected people's deputies and two representatives nominated by the States of Alderney[2].

The sanction of Her Majesty in Council is required for laws (*projets de loi* approved by the States of Deliberation) but not for ordinances; ordinances may not be used to alter a law or any rule of common law or to impose taxes[3]. The Legislation Select Committee of the States may give immediate effect to draft ordinances, subject to the States' power to annul them by resolution.

Public services are administered by departments and committees of the States; within this framework a Chief Minister presides over the Policy Council comprising the Chief Minister, Deputy Chief Minister and the minister of each department[4]. The European Convention on Human Rights[5] has been given effect throughout the Bailiwick in terms similar to the Human Rights Act 1998[6].

1 See PARA 792.

2 Reform (Guernsey) Law 1948 (Guernsey) art 1(1) (substituted by the Reform (Replacement of Conseillers) (Guernsey) Law 1998 (Guernsey) art 1; amended by the Reform (Guernsey) (Amendment) Law 2003). A principal element of the reform effected by the Reform (Guernsey) Law 1948 (Guernsey) was the divesting of the Royal Court of almost all of its legislative functions (arts 63, 64), which now extend only to the making of rules of procedure for the Royal Court or its subordinate courts. As to the judicial powers of the Royal Court see PARA 798.

3 The States' power to make ordinances not only does not include alteration of laws passed with Her Majesty in Council's sanction, or taxation, but also is limited generally so as to exclude international matters in relation to which the United Kingdom represents the Bailiwick, such as the regulation of fishing beyond the Bailiwick's three-mile territorial waters: *Jersey Fishermen's Association v States of Guernsey* [2007] UKPC 30, [2008] 1 LRC 198, [2007] All ER (D) 39 (May).

4 Departments and committees are constituted and regulated by resolutions of the States pursuant to the States Committees (Constitution and Amendment) (Guernsey) Law 1991 (Guernsey).

5 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

6 Human Rights (Bailiwick of Guernsey) Law 2000 (Guernsey); Human Rights (Implementation and Amendment) (Bailiwick of Guernsey) Law 2004 (Guernsey).

796. Alderney.

The government of Alderney as a distinct jurisdiction within the Bailiwick of Guernsey is provided for by a *projet de loi* approved by the States of Alderney and ratified by Order in Council with effect from 1 May 2005[1]. It provides that all legislative and executive functions within Alderney are exercised by the States of Alderney, or, in the case of a function conferred by or under an enactment or resolution, by the committee of the States or other body on which, or by the person on whom, the function is conferred[2]. The States consist of ten members and the President, each of whom are elected by secret ballot at an election to be held every four years in the case of an election for the President and every two years in the case of the other members[3]. Responsibility for the airfield, education, health services, immigration, police, social services and adoption and child care in Alderney is vested in the States of Guernsey[4]. The power of the States of Alderney to enact a law (by *projet de loi*) impinging on these transferred services or functions, or to make a law or ordinance involving any additional expenditure of public funds, is exercisable only with the consent of the States of Guernsey. In criminal and transferred matters the States of Guernsey may legislate for Alderney without consent, and in others by consent of the States of Alderney.

Judicial functions within Alderney are exercisable, except as otherwise provided, by the Court of Alderney, which has unlimited civil and limited criminal jurisdiction[5]. Its jurats are appointed by the Secretary of State for Justice[6]. Appeal lies to the Royal Court of Guernsey[7], and thence to the Court of Appeal and the Privy Council[8].

1 See the Government of Alderney Law 2004 (Guernsey); the Government of Alderney Law 2004 (Commencement) Ordinance 2005 (Guernsey).

2 Government of Alderney Law 2004 (Guernsey) art 1.

3 Government of Alderney Law 2004 (Guernsey) arts 27, 28.

4 See the Alderney (Application of Legislation) Law 1948 (Guernsey), preamble, art 1, Schedule.

5 Government of Alderney Law 2004 (Guernsey) arts 2, 5(b), 11-13.

6 Government of Alderney Law 2004 (Guernsey) art 5(a).

7 Government of Alderney Law 2004 (Guernsey) art 19.

8 See PARA 798.

797. Sark.

Sark, like Alderney, is part of the Bailiwick of Guernsey[1]. Its government is provided for by a *projet de loi* approved by the legislative body, the Chief Pleas of Sark, and ratified by Order in Council with effect from 1 September 2008[2]. The Chief Pleas is made up of the Seigneur of Sark, the Seneschal (appointed by the Seigneur for life with the approval of the Lieutenant Governor[3]), and 28 elected members (conseilliers)[4]. It legislates by law made with the approval of Her Majesty in Council or by ordinance for public order and local affairs[5]; taxation requires the consent of Her Majesty in Council[6], except in the case of revenue raised by direct tax for the purposes of the douzaine[7]. The exercise by the Seigneur of his power of veto[8] may be overridden by the Chief Pleas when the ordinance is resubmitted to them[9]. An ordinance can be annulled by the Royal Court of Guernsey if unreasonable or ultra vires, subject to the right of the Chief Pleas to appeal to Her Majesty in Council[10]. The States of Guernsey may legislate for Sark, in criminal matters without consent and in others by consent.

Executive functions which may be exercised within Sark are exercisable by the Chief Pleas or, in the case of a function imposed or conferred by an enactment or by a resolution, by the committee of the Chief Pleas or other body on which, or by the person on whom, the function is so imposed or conferred[11].

All judicial functions which may be exercised within Sark are exercisable, except as otherwise provided, by the Court of the Seneschal, which consists of the Seneschal sitting alone and has unlimited civil and limited criminal jurisdiction[12]. There is a right of appeal from the Court in criminal matters to the Royal Court of Guernsey sitting as a Full Court and in civil matters to the Royal Court sitting as an Ordinary Court[13].

1 But Sark is in no way constitutionally subordinate to Guernsey: *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319, [2009] 2 WLR 1205, [2008] All ER (D) 32 (Dec).

2 Reform (Sark) Law 2008 (Guernsey).

3 Reform (Sark) Law 2008 (Guernsey) s 6.

4 Reform (Sark) Law 2008 (Guernsey) ss 1, 21, 23 (s 23 amended by the Reform (Sark) (amendment) Law 2008 (Guernsey) art 1). These provisions, and the disqualification of aliens from membership of the Chief Pleas (see the Reform (Sark) Law 2008 (Guernsey) s 28(3)(b)), do not violate the European Convention on Human Rights save in so far as the Seneschal is both a member of the Chief Pleas and bearer of the judicial powers exercisable on the island (see the text and note 12): *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319, [2009] 2 WLR 1205, [2008] All ER (D) 32 (Dec).

5 Reform (Sark) Law 2008 (Guernsey) s 37. The question whether, in any other case, a law of Guernsey extends to Sark as part of its law is determined by the terms of that law or of the Order in Council sanctioning it: see *Vaudin v Hamon* [1974] AC 569, PC; and see the terms of the enactments there cited.

6 Reform (Sark) Law 2008 (Guernsey) s 60.

7 Direct Taxes (Sark) Law, 2002; Reform (Sark) Law 2008 (Guernsey) s 60. As to the douzaine (a committee of the Chief Pleas) see s 43.

8 See the Reform (Sark) Law 2008 (Guernsey) s 38(1).

9 Reform (Sark) Law 2008 (Guernsey) s 38(2), (3).

10 Reform (Sark) Law 2008 (Guernsey) s 39.

11 Reform (Sark) Law 2008 (Guernsey) s 1; *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [15], [2009] 2 WLR 1205 at [15], [2008] All ER (D) 32 (Dec).

12 Reform (Sark) Law 2008 (Guernsey) ss 2, 10-13.

13 Reform (Sark) Law 2008 (Guernsey) s 19.

UPDATE

797 Sark

NOTES 1, 4, 11--*Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

798. Judicature of Guernsey.

The court of general jurisdiction, which also hears appeals from the Court of Alderney and the Court of the Seneschal in Sark[1], is the Royal Court of Guernsey; its members are the Bailiff, a Deputy Bailiff, and a Judge or Judges of the Royal Court authorised by the Bailiff to discharge judicial functions of the office of Bailiff[2], as well as lieutenant bailiffs and jurats[3]. Appeal lies to a Court of Appeal[4], from which appeal to the Judicial Committee of the Privy Council[5] lies either as of right[6] or, in some other cases (including all criminal cases)[7], only by special leave of the Privy Council[8].

1 See *Godfray v Sark Island Constables* [1902] AC 534, PC; Order in Council dated 20 June 1922 art 3; Government of Alderney Law 2004 (Guernsey) art 19; Reform (Sark) Law 2008 (Guernsey) art 19.

2 Royal Court (Reform) (Guernsey) Law 2008 (Guernsey) art 1(2). Any number of Judges of the Royal Court may be appointed: art 1(3). Such judges are appointed by the Royal Court; as to their qualifications see art 3.

3 Royal Court (Reform) (Guernsey) Law 2008 (Guernsey) art 8(1). Elections to the office of jurat take place through the States of Election, which now have no other function than to elect jurats: see the Reform (Guernsey) Law 1948 (Guernsey), arts 4, 5 (art 4 amended by the Royal Court (Reform) (Guernsey) Law 2008 (Guernsey) art 9(1)).

4 Court of Appeal (Guernsey) Law 1961 (Guernsey). The law applicable by the Court of Appeal develops and is not limited to the state of the law as it stood prior to the coming into force of the 1961 Law in 1964: *Bassington v HM Procureur* (1998) 26 GLJ 86 (Guernsey CA).

5 Particular provision for appeals from Guernsey is made by Orders in Council dated 13 May 1823 (SR & O Rev 1948 XI p 344), and 15 July 1835 (SR & O Rev 1948 XI p 347).

6 Court of Appeal (Guernsey) Law 1961 (Guernsey).

7 *Quin v R* (1951) Times, 8 November, PC (the judgment of 6 October 1955 is reported in Orders in Council vol 16, 1954-55 (Guernsey), p 252).

8 *Re Tupper* (1834) 2 Knapp 201, PC.

(2) THE ISLE OF MAN

799. Constitutional status and government of the Isle of Man.

The Isle of Man is not part of the United Kingdom[1], nor is it a British overseas territory, but it is included in the British Islands[2] and is a British possession[3]. It is not a colony or foreign dominion of the Crown, so as to be exempt from the power of the English High Court to issue the writ of habeas corpus[4]. Long held by a feudatory of the Crown, it was revested in the Crown under Act of Parliament in 1765[5]. Citizens of the Isle of Man are British citizens[6]. The United Kingdom government is internationally responsible for the external affairs of the Isle of Man in substantially the same way as for those of British overseas territories[7].

In respect of the Isle of Man, the Crown acts through Her Majesty's Privy Council, on the recommendation of ministers of the United Kingdom government in their capacity as Privy Councillors.

The English common law does not apply to the Isle of Man, where a system prevails that is based on its customary law[8]; but Privy Council and high English precedents have persuasive force unless Manx law or conditions justify divergence[9]. Statutes of the Parliament of the United Kingdom which apply to the whole of Her Majesty's dominions, or in which the Isle of Man is specially named, or which by necessary implication apply to it, are in force in the Island[10], though it is much more usual for Acts of Parliament not to extend directly to the Isle of Man but to contain a provision enabling them to be extended by Order in Council. The existence of a power of extension by Order in Council does not preclude Tynwald from legislating on the same subject matter[11].

The Crown appoints the Governor (in practice the Lieutenant Governor), who usually holds office for seven years. The Manx administration is conducted by the Council of Ministers, which consists of the Chief Minister and the Ministers, the Chief Minister being elected from among the members of Tynwald present and voting on defined occasions[12].

The legislature consists of the Governor with the Legislative Council and the House of Keys, the whole assembly being known as Tynwald or the Tynwald Court[13]. The Legislative Council comprises a President elected by Tynwald (from among the elected members of the Legislative Council and the Keys), the Bishop of Sodor and Man and the Attorney General[14] and members elected by the House of Keys[15]. Members of the House of Keys are elected for five years[16]; they elect a speaker from among their own number. Legislation by the United Kingdom Parliament is confined to matters of special importance and non-local character[17].

The Lieutenant Governor has delegated responsibility to grant royal assent to non-reserved legislation relating to domestic matters; reserved legislation requires royal assent through the Privy Council in the same way as acts (*projets de loi*) of the legislatures of Jersey, Guernsey and Sark.

Any law passed or made by the legislature of the Isle of Man, if expressed to be passed or made in the implementation of the Treaties[18] of accession of the United Kingdom to the European Communities and of the obligations of the United Kingdom thereunder, is not void or inoperative by reason of any inconsistency with or repugnancy to an Act of the United Kingdom Parliament (whether passed or to be passed) extending to the Island[19], nor by reason of its having some operation outside the Island[20]. The treaties establishing the European Communities apply to the Isle of Man only for certain purposes[21].

The European Convention on Human Rights[22] has been given effect in terms similar to the Human Rights Act 1998[23].

1 *Davison v Farmer and Grace* (1851) 6 Exch 242.

2 Interpretation Act 1978 Sch 1, Sch 2 Pt I para 4(1) (as amended: see note 3). See PARA 705 note 2.

3 Interpretation Act 1978 ss 5, 22, 23, Sch 1, Sch 2 Pt I para 4(1) (s 22 amended by the Legislative and Regulatory Reform Act 2006 s 25(2); the Interpretation Act 1978 Sch 2 Pt I para 4(1) amended by the Family Law Reform Act 1987 Sch 2 para 74, Sch 3 para 1, Sch 4; the Health Authorities Act 1995 Sch 3). See also PARA 703.

4 *Ex p Brown* (1864) 5 B & S 280; cf the opinion of the legislative draftsman of the Isle of Man in Subject Guide to Acts of Parliament extending or relating to the Isle of Man 1350-1975 (Government Printer, Douglas) 31. See the Habeas Corpus Act 1862 s 1, which forbids the issue of a writ in the case of a colony or foreign dominion of the Crown having a court empowered to issue a writ; *R v Earl of Crewe, ex p Sekgome*[1910] 2 KB 576 at 591-592, CA, per Vaughan Williams LJ and at 622 per Kennedy LJ; and see **ADMINISTRATIVE LAW**. As to the meaning of 'colony' see PARA 705.

5 Isle of Man Purchase Act 1765 (repealed); and see also 45 Geo 3 c 123 (1805) (repealed) and 6 Geo 4 c 34 (1825) (repealed); 1 Burge's Commentaries on Colonial and Foreign Law (1907) 128.

6 British Nationality Act 1981 ss 1, 11, 50(1) (s 1 amended by the Adoption (Intercountry Aspects) Act 1999 s 7; the British Overseas Territories Act 2002 s 5, Sch 1 para 1; the Adoption and Children Act 2002 ss 137(3), (4), 139(3), Sch 5). See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**. As to the rights of the citizens of the Isle of Man since the United Kingdom joined the European Communities see PARA 790 note 4.

7 See PARA 810.

8 *Re Earl of Derby* (1522) [1522-1920] Manx LR 1, PC; *Isle of Man Case (Derby Succession)* (1598) [1522-1920] Manx LR 2, PC; *Bishop of Sodor and Man v Earl of Derby* (1751) 2 Ves Sen 337, [1522-1920] Manx LR 11 (Ch).

9 *Frankland v R*[1987] AC 576, [1987-89] Manx LR 65, PC; *F v Oake* [1996-98] Manx LR 97 (IoM H Ct, Staff of Govt Div).

10 See *Isle of Man Case (Derby Succession)* (1598) [1522-1920] Manx LR 2, PC; *Christian v Nowell* (1663) [1522-1920] Manx LR 5, PC; *Bishop of Sodor and Man v Earl of Derby* (1751) 2 Ves Sen 337, [1522-1920] Manx LR 11 (Ch); *Burrow v Quirk* (1833) [1522-1920] Manx LR 46, PC; *Re Robinson* (30 January 1936, unreported), IoM HC, judgment printed in Subject Guide to Acts Extending or Relating to the Isle of Man 1350-1975 (Government Printer, Douglas) 13-26 at 21-23.

11 *Re CB Radio Distributors Ltd* [1981-83] Manx LR 381 at 397, IoM HC. Quaere the court's further dictum in that case that in the event of conflict between an Act of Tynwald and an Act of the United Kingdom Parliament the later enactment (whether of Tynwald or Parliament) must prevail.

12 Council of Ministers Act 1990 (Isle of Man) ss 1, 2. Ministers are appointed from among the members of Tynwald by the Governor, acting on the advice and with the concurrence of the Chief Minister: s 3.

13 Otherwise than at sittings of Tynwald at St John's on Tynwald Hill for the promulgation of Acts, the swearing and admission of coroners, and any other business of Tynwald customarily done on Tynwald Hill, the Governor no longer presides at sittings of Tynwald: and accordingly Her Majesty may assent to a Bill by and with the advice and consent of the Council and Keys in Tynwald assembled: Constitution Act 1990 (Isle of Man) s 1 (amended by the Constitution (Amendment) Act 2005 (Isle of Man) s 1(1)). The President of Tynwald is elected by Tynwald, being a member of the Keys or an elected member of the Legislative Council (Constitution Act 1990 (Isle of Man) s 2), and is not eligible for appointment as Chief Minister, a minister, or a member of a department or statutory board (Constitution Act 1990 (Isle of Man) s 5A (added by the Presiding Officers Act 2008 (Isle of Man) s 4)). A bill passed by the Keys but not yet passed by the Legislative Council 12 months after being sent to it may by resolution approved by at least 17 members of the Keys be sent for assent: see the Constitution Act 2006 (Isle of Man) s 1.

14 The Attorney General may not, however, vote either in the Council or in Tynwald, and his presence is not reckoned towards a quorum: Isle of Man Constitution Act 1971 (Isle of Man) s 1.

15 Isle of Man Constitution Amendment Act 1919 (Isle of Man) s 7 (amended by the Isle of Man Constitution Amendment Act 1965 (Isle of Man) s 1; the Isle of Man Constitution (Amendment) Act 1975 (Isle of Man) s 1; the Constitution Act 1990 (Isle of Man) Sch 1).

16 Representation of the People Act 1995 (Isle of Man) s 2.

17 The general power of customs legislation is vested in the United Kingdom Parliament (cf the Isle of Man Purchase Act 1765 s 1 (repealed)), but Tynwald has authority to make provisions with regard to customs and harbours. The Isle of Man Act 1979 gives effect to a Customs and Excise Agreement dated 15 October 1979 between the government of the United Kingdom and the government of the Isle of Man (under which the Isle of Man government agrees to maintain import and export controls parallel to those in force in the United Kingdom): both countries are to be treated as a single area for the purposes of value added tax (s 6 (amended by the Value Added Tax Act 1983 Sch 9 para 3; the Value Added Tax Act 1994 Sch 14 para 7)); goods removed from the United Kingdom to the Isle of Man are deemed for customs and excise purposes not to be exported from the United Kingdom (Isle of Man Act 1979 s 9 (amended by the Forgery and Counterfeiting Act 1981 s 21(3); the Finance Act 1984 s 15(7); the Finance Act 1996 s 24(e), Sch 41 Pt III)); the Commissioners for Revenue and Customs are to pay annually to the Treasurer of the Isle of Man the specified Isle of Man share of customs, excise, pool betting and lottery duties and value added tax (subject to certain exceptions with regard to gaming machines), chargeable in each case under the law of the United Kingdom or the Isle of Man (Isle of Man Act 1979 ss 1, 2 (s 1 amended by the Value Added Tax Act 1983 Sch 9 para 3; the Value Added Tax Act 1994 Sch 14 para 7; the Statute Law (Repeals) Act 2004; and by SI 1994/3041; SI 1999/2925; and by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)); and relevant judgments of the High Court of the Isle of Man are enforceable (Isle of Man Act 1979 s 4).

18 See PARA 790 note 4.

19 The rule stated in the text applies likewise to any provision having the force or effect in the Island of an Act of the United Kingdom Parliament (but does not so apply to the European Communities Act 1972 s 2, which includes the rule, itself); and any such Act or provision so extending to the Island is to be construed and have effect subject to the provisions of any law of the class described in the text, passed or made by the legislature of the Island: s 2(6).

20 European Communities Act 1972 s 2(6). See also PARA 828. The European Communities (Isle of Man) Act 1973 (Isle of Man) s 2 and s 6 are expressed to be enacted for the purposes mentioned in the European Communities Act 1972 s 2(6): European Communities (Isle of Man) Act 1973 (Isle of Man) s 1(5).

21 See the Act of Accession (1972) (TS 16 (1979); Cmnd 5179, 7461) arts 25-27; and see eg Case C-293/02*Jersey Produce Marketing Organisation Ltd v Jersey, intervening*[2006] All ER (EC) 1126, [2005] All ER (D) 108 (Nov), ECJ (Community rules on customs matters and quantitative restrictions are to be applied to the Channel Islands and the Isle of Man under the same conditions as they are applied to the United Kingdom).

22 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**).

23 Human Rights Act 2001 (Isle of Man).

800. Judicature of the Isle of Man.

The High Court consists of the First Deemster and Clerk of the Rolls (who is president of the High Court), the Second Deemster, and the Judge of Appeal[1]. It comprises the Civil Divisions (Chancery, Common Law and Family Divisions), and the Staff of Government Division (also known as the Appeal or Appeals Division). Appeals are heard by two judges of the High Court, or with the consent of the parties by a single judge, and further appeal lies to the Privy Council either by leave of the Appeal Division or with special leave of Her Majesty[2].

1 High Court Act 1991 (Isle of Man) ss 1-3.

2 High Court Act 1991 (Isle of Man) ss 22-24; *Gill v Westlake* [1910] AC 197, PC; *Ex p Aldred* [1902] AC 81, PC; *Nelson v R* [1902] AC 250, PC.

4. BRITISH OVERSEAS TERRITORIES

(1) ACQUISITION OF OVERSEAS TERRITORIES

801. Modes of acquisition of overseas territories.

Colonies are treated for purposes of constitutional law as either: (1) settled; or (2) conquered or ceded[1], and the manner of acquisition affects the constitutional position of the colony, particularly the powers of the Crown[2]. Every colony must be assigned to one or other of these two classes; the classification is one of law, and once made by practice or judicial decision will not be disturbed by historical research[3]. The basis of distinction is the stage of civilisation considered to have existed in the territory at the time of acquisition: if there was no population or no form of government considered civilised and recognised in international law, possession was obtained by settlement; where there was an organised society to which international personality was attributable, acquisition rested on cession or conquest[4].

The general characteristics of protectorates and of protected states[5] and territories have been indicated above[6]. No states or territories now belong to these categories. Acquisition of legislative jurisdiction in a protectorate was by treaty, grant, usage, sufferance or other lawful means[7]. Where agreements existed they were not in all cases treated as treaties in international law; legislative dispositions by the Crown with regard to the inhabitants (who were not subjects of Her Majesty) were acts of state not open to question in the courts[8].

1 1 Bl Com (1765 Edn) 104.

2 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61 at [79]-[80], [2008] 4 All ER 1055 at [79]-[80], [2008] 3 WLR 955 at [79]-[80], [2008] 5 LRC 769 at [79]-[80] per Lord Rodger of Earlsferry; and see PARAS 807-808.

3 See *Christian v R*[2006] UKPC 47, [2007] 2 AC 400, [2007] 1 LRC 726 (citing and following this and the following sentence in the text as they appeared in a previous edition of this title); *Milirrpum v Nabalco Pty Ltd* [1972-73] ALR 65 at 124, 153, 17 FLR 141 at 202, 242, Northern Territory SC; *R v Kojo Thompson* (1944) 10 WA CA 201, West African CA (special leave to appeal refused by Privy Council: see Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) pp 110-111); and see *Phillips v Eyre*(1870) LR 6 QB 1 at 18 per Willes J; *Coe v Commonwealth of Australia* (1979) 24 ALR 118 at 128-129, cf 136, 137-138, Aust HC.

4 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*[2001] QB 1067 at 1102, [2001] 3 LRC 249 at 284, DC, per Laws LJ ('the question, ceded or settled, has surely to be determined as at the time when the territory concerned becomes subject to the Queen's dominion'); *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61 at [79]-[80], [2008] 4 All ER 1055 at [79]-[80], [2008] 3 WLR 955 at [79]-[80], [2008] 5 LRC 769 at [79]-[80]; *Lyons Corpn v East India Co* (1836) 1 Moo PCC 175 at 272, 274; *Freeman v Fairlie* (1828) 1 Moo Ind App 305 at 324-325.

5 In a protected state there was a definite agreement between the ruler of the state and the Crown, but the relationship between the Crown and the protected state depended as much on usage as on treaty. The ruler of a protected state was entitled to the immunity from judicial process in England accorded to the rulers of sovereign states: *Mighell v Sultan of Johore*[1894] 1 QB 149, CA; *Sultan of Johore v Abubakar Tunku Aris Bendahar*[1952] AC 318, PC; *Duff Development Co v Kelantan Government*[1924] AC 797, HL; and see *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*[1952] 2 QB 390, [1952] 2 All ER 64, CA.

6 See PARA 708.

7 See the Foreign Jurisdiction Act 1890, preamble. The acquisition of jurisdiction may result from processes as informal as 'a result of discussions with the Ruler': see *Baker v Alford*[1960] AC 786 at 790, 804, PC; and see also *The Laconia* (1863) 2 Moo PCC NS 161 at 182-183. The extent of jurisdiction, both in general and as to particular topics, at any time, is a subject for decision by a Secretary of State at any time, and this decision is binding on all courts in Her Majesty's dominions: Foreign Jurisdiction Act 1890 s 4. See also *Baker v Alford*[1960] AC 786; and PARA 707 note 10. As to the Secretary of State see PARA 708 note 4.

8 *Sobhuza II v Miller*[1926] AC 518 at 523, 528, PC; *Imperial Japanese Government v Peninsular and Oriental Steam Navigation Co*[1895] AC 644 at 658, PC; *R v Earl of Crewe, ex p Sekgome*[1910] 2 KB 576 at 606, CA, per Vaughan Williams LJ, and at 624, 628 per Kennedy LJ; and see *Oyekan v Adele*[1957] 2 All ER 785 at 788, PC. As to the content and limit of the doctrine of act of state see PARAS 707 note 4, 867 note 8. Modern courts might hold that the Crown's assertion of sovereignty entailed a duty of honourable dealing with the inhabitants, a duty cognisable by the courts: *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2005] 4 LRC 86, Can SC; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, [2005] 4 LRC 113, Can SC. As to British nationality and citizenship generally see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

UPDATE

801. Modes of acquisition of overseas territories.

NOTES 2, 4 - *Bancoult*, cited, reported at [2009] 1 AC 453.

802. Settlement.

Settlement took three main forms. First, occupation of territory might be authorised by the Crown, possession taken in the name of the Crown, and settlers introduced. Second, the Crown might recognise as British territory settlements made by subjects of Her Majesty without previous authority[1]. Third, uninhabited islands or areas might be formally annexed.

A settled colony reconquered or ceded back after conquest or cession does not lose its status as a settled colony[2].

1 The recognition need not be formal: *A-G for British Honduras v Bristowe* (1880) 6 App Cas 143 at 148, PC.

2 See *Gumbe's Case* (1834) 2 Knapp 369 (a case of a conquered colony).

803. Conquest or cession.

Most conquered colonies were afterwards formally ceded to the Crown by treaty, but there are examples of simple conquest, and for this purpose conquest by a chartered British company is conquest by the Crown[1]. Provided that the Crown manifests an intention that the territory should become part of Her Majesty's dominions[2], a territory conquered by British arms becomes immediately a dominion of the Crown[3] and therefore necessarily subject to the United Kingdom Parliament[4]; formalities of annexation are not required[5].

Cession may be made by a state government[6] or by the inhabitants[7]. Annexation in face of an organised society considered civilised will be treated as a case of cession (not settlement) even before or in the absence of cession by international formalities. Where cession is by treaty, the courts will ascertain the legal effects of the cession by looking not to the treaty (which is an act of state) but to the conduct of the Crown[8].

1 *Re Southern Rhodesia* [1919] AC 211, PC.

2 See *Sovfracht VO v Van Udens Scheepvaart en Agentuur Maatschappi NV Gebr* [1943] AC 203 at 220, [1943] 1 All ER 76 at 85, HL, per Lord Wright. Territory conquered and occupied by British forces during the course of a war does not automatically become part of Her Majesty's dominions: *Wong Man On v Commonwealth* (1952) 86 CLR 125 at 131, Aust HC, per Fullagar J.

3 *Campbell v Hall* (1774) 20 State Tr 239; *The Foltina* (1814) 1 Dods 450.

4 *Campbell v Hall* (1774) 20 State Tr 239 at 323, 1 Cowp 204 at 208; *Re Southern Rhodesia* [1919] AC 211 at 221, PC.

5 *Re Southern Rhodesia* [1919] AC 211 at 240, PC.

6 Seychelles, St Vincent, Grenada, St Lucia, and part of Dominica were acquired from France. As to Grenada see *Campbell v Hall* (1774) 20 State Tr 239. Gibraltar was acquired from Spain.

7 Eg Malta: see *Sammut v Strickland* [1938] AC 678, [1938] 3 All ER 693, PC.

8 *Oyekan v Adele* [1957] 2 All ER 785 at 788, [1957] 1 WLR 876 at 880, PC; and see also *Re Wong-Hon* [1959] HKLR 601, Hong Kong FC.

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804. Non-succession of sovereign liabilities.

Tribunals in a British possession have no jurisdiction in respect of claims against the Crown based on its succession to the territory of another state against which such claims would have lain[1].

1 *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, DC; *Postmaster-General v Taute* [1905] TS 582; *Randjeslaagte Syndicate v The Government* [1908] TS 404; *Verceniging Municipality v Verceniging Estates Ltd* [1919] TPD 159; and see also the dicta in *A-G v Nissan* [1970] AC 179 at 210, [1969] 1 All ER 629 at 636-637, HL, per Lord Reid, at 226 and 649-650 per Lord Pearce, and at 231-232 and 654-655 per Lord Wilberforce. See further PARA 867 note 8.

(2) POWERS AND RESPONSIBILITIES OF UNITED KINGDOM AUTHORITIES IN RELATION TO BRITISH OVERSEAS TERRITORIES

805. The United Kingdom Parliament's powers.

The competence of the Parliament of the United Kingdom to legislate for the British overseas territories and other dependencies of the Crown has not been in serious doubt since the seventeenth century[1]. From the middle of the nineteenth century, however, there was a convention against Parliament legislating for the self-governing colonies and colonies with responsible government[2] without their consent. But this convention does not restrict the legal powers of Parliament, and may in any event be inoperative in some circumstances[3].

1 See *Madzimbamuto v Lardner-Burke and George*[1969] 1 AC 645 at 722, [1968] 3 All ER 561 at 572, PC.

2 As to 'responsible government' see PARA 705.

3 *Madzimbamuto v Lardner-Burke and George*[1969] 1 AC 645 at 723, [1968] 3 All ER 561 at 573, PC.

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806. Responsibilities of the United Kingdom government.

Since the United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown[1], acts of Her Majesty herself in respect of any British overseas territory or other dependency of the United Kingdom are performed only on the advice of the United Kingdom government[2], and Her Majesty's ministers in the United Kingdom retain certain responsibilities in respect of the government of any such territory or other dependency and are entitled to exercise them with a view to the interests not only of the territory in question but also of the United Kingdom and, as it may be, of its other dependencies and overseas territories[3]. These fundamental principles are not inconsistent with the further principle that on the grant of a representative legislature, and perhaps even as from the setting up of courts, a legislative council and other such structures of government, Her Majesty's government in an overseas territory or dependency is distinct from Her Majesty's government in the United Kingdom[4]; or with the fact that, to the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature[5].

1 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [47], [2008] 4 All ER 1055 at [47], [2008] 3 WLR 955 at [47], [2008] 5 LRC 769 at [47], quoting with approval the paragraph corresponding to the text and notes 1-5 in a previous edition of this title (see also *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [106], [2009] 2 WLR 1205 at [106], [2008] All ER (D) 32 (Dec)). Cf *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 377. See also PARA 717.

2 See Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) p 81.

3 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769; *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319 at [106], [2009] 2 WLR 1205 at [106], [2008] All ER (D) 32 (Dec)); and see PARA 720 note 6.

4 See *Manuel v A-G* [1983] Ch 77 at 90-95, CA; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta* [1982] QB 892 at 921-922, 927, 928-931, cf 911, 916, 917, [1982] 2 All ER 118 at 132, 136-138, cf 123, 126, 127-128, CA (petition dismissed [1982] QB 892 at 937, [1982] 2 All ER 118 at 143, HL); *Tito v Waddell (No 2)* [1977] Ch 106 at 231, 320, [1977] 3 All ER 129 at 233, 306; *R v Secretary of State for the Home Department, ex p Shadeo Bhurosah* [1968] 1 QB 266, DC (affd [1968] 1 QB 266 at 278, [1967] 3 All ER 831, CA); and the cases cited in note 5.

5 Thus the powers of the Crown are exercisable, on the advice of different ministers, by different agents in different localities: *Theodore v Duncan* [1919] AC 696 at 706, PC; *Dominion of Canada v Province of Ontario* [1910] AC 637 at 645, PC; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152, Aust HC. It is not altogether clear to what extent this doctrine of distinct agents, capable of entering into justiciable relations one with another, depends on the degree of 'responsible government' in the sense of responsibility of Her Majesty's ministers in a territory to a local representative legislature. Perhaps what is decisive for many purposes is the existence of separate treasuries or consolidated funds: see *A-G v Great Southern and Western Rly Co of Ireland* [1925] AC 754 at 779, HL, per Lord Phillimore; *Fairthorn v Territory of Papua* (1938) 60 CLR 772 at 792, Aust HC, per Dixon J; see also the cases cited in PARA 717 note 15.

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806 Responsibilities of the United Kingdom government

NOTES 1, 3--*Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

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807. The Crown's powers in settled colonies.

In settled colonies, the prerogatives of the Crown and the rights and immunities of subjects of Her Majesty were similar to those enjoyed in the United Kingdom[1]. Thus settlers from the mother-country carried with them such portions of the English common and statute law as were applicable to their new situation[2]. At common law the Crown preserves the executive power and has authority to appoint a Governor, to establish courts of law (but not ecclesiastical courts[3]), and to provide for the summoning of a local representative legislature[4]. Once such a legislature has been effectively provided for by the authority of the Crown, the Crown's power of legislation (whether ordinary or constituent) by the prerogative is suspended[5] during the effective existence of that legislature[6]; but even before the establishment of a legislature, the Crown has no general power of ordinary legislation since it has no such general power in the United Kingdom[7].

The inconvenience of the common law rule led[8] to the passing of the British Settlements Act 1887, by which for any British settlement[9] not under the jurisdiction of a legislature (other than a legislature constituted under that Act or under the Acts it repealed) the Queen in Council may establish such laws and institutions and constitute such courts and provide for the administration of justice as may appear to be necessary for the peace, order and good government of Her Majesty's subjects and others within the settlement[10]. These are continuing powers, and in exercising them the Crown's authority to legislate generally for the territory by Order in Council is confirmed[11]. But neither these plenary powers nor the provisions of the Colonial Laws Validity Act 1865 which prevent review for breach of fundamental principles of English law[12] operate to prevent the courts, at least in England, from reviewing Orders in Council purporting to exercise such a power, on grounds of legality, rationality or procedural impropriety (including inconsistency with legitimate expectations)[13].

1 *Memorandum* (1722) 2 P Wms 74; *Kielley v Carson* (1842) 4 Moo PCC 63 at 84-85; *Lauderdale Peerage* (1885) 10 App Cas 692, HL. As to British nationality generally (including British overseas territories citizenship) see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM**.

2 *Kielley v Carson* (1842) 4 Moo PCC 63 at 84; and see PARA 869.

3 *Re Lord Bishop of Natal* (1865) 3 Moo PCCNS 115; *Long v Bishop of Cape Town* (1863) 1 Moo PCCNS 411.

4 *Kielley v Carson* (1842) 4 Moo PCC 63; *Phillips v Eyre* (1870) LR 6 QB 1; *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 279, CA, per Salmon LJ, and at 294 per Lord Denning MR; *Gilbertson v State of South Australia* [1978] AC 772 at 782, PC.

5 *Campbell v Hall* (1774) 20 State Tr 239 at 328-329; *Re Lord Bishop of Natal* (1865) 3 Moo PCCNS 115 at 148; *Sammut v Strickland* [1938] AC 678 at 701, PC; *Wacando v Commonwealth of Australia* (1981) 37 ALR 317 at 324, 332, Aust HC.

6 *Sammut v Strickland* [1938] AC 678, PC; *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 293, CA, per Lord Denning MR, and at 299 per Russell LJ.

7 See *Sammut v Strickland* [1938] AC 678 at 701, PC. Thus, while principally concerned with the powers of Her Majesty's government in the United Kingdom with respect to certain dependent territories, the principles described in the text are also applicable to the determination of the scope of the royal prerogative as exercised by the Crown in right of the local territory: see *McGuinness v A-G of Victoria* (1940) 63 CLR 73, 46 ALR 110, Aust HC; *Clough v Leahy* (1904) 2 CLR 139, 11 ALR 32, Aust HC; *Johns & Waygood Ltd v Utah Australia Ltd* [1963] VR 70, Vict SC.

8 See *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 294, CA, per Lord Denning MR.

9 Ie any British possession not acquired by cession or conquest: British Settlements Act 1887 s 6.

10 British Settlements Act 1887 s 2, which empowers Her Majesty in Council to provide a Constitution to come into effect immediately before the independence of the territory: *Buck v A-G* [1965] Ch 745 at 772, [1965] 1 All ER 882 at 888, CA, per Diplock LJ, and at 773 and 888-889 per Russell LJ. The Queen may also delegate all or any of these powers under the British Settlements Act 1887 to any person, persons or authority: s 3; British Settlements Act 1945 s 1.

11 The power is plenary and may be exercised retrospectively: *Sabally and N'Jie v A-G* [1965] 1 QB 273, CA. Further, the Crown may have powers in relation to settled colonies conferred in it by other statutes: *Newbery v R* (1965) 7 FLR 34, Norfolk Island SC.

12 Ie the Colonial Laws Validity Act 1865 ss 1-3.

13 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769; and see PARAS 808 notes 1, 2, 812.

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807 The Crown's powers in settled colonies.

NOTE 13--*Bancoult* cited, reported at [2009] 1 AC 453. See *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin), unreported: the Crown's power to legislate for the peace, order and good government of a territory, whether under the prerogative or statute, is in practice not open to question in the courts other than in the most exceptional circumstances. The principles of repugnancy, legality, judicial review and human rights are not really distinct from irrationality and statutory construction, and accordingly the removal or suspension of the right to trial by jury and the right to self-determination is not as such *Wednesbury* unreasonable and challengeable under *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.

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808. The Crown's competence in conquered or ceded colonies.

In a conquered or ceded colony the Crown, by virtue of its prerogative, has full power to establish such executive, legislative, and judicial arrangements as the Crown thinks fit, and generally to act both executively and legislatively, provided the provisions made by the Crown do not contravene any Act of Parliament extending to the colony or to all British possessions[1]. In particular, there is no requirement that exercises of such power be for the peace, order or good government of the territory as distinct from the undivided realm constituted by the United Kingdom and all its overseas territories[2]. The Crown's legislative and constituent powers are exercisable by Order in Council, Letters Patent, or Proclamation[3], but when a representative legislature[4] has been granted to the colony the Crown's ordinary powers (as well, it appears, as its constituent powers[5]) cannot be exercised while the grant is in force[6] and the legislative institutions are capable of functioning[7], unless (as is generally the case in respect of the constituent powers of amending, revoking and granting Constitutions) they are expressly reserved in the grant[8], or authority is granted by Act of Parliament. If reserved in the grant, the prerogative powers may be exercised retrospectively[9], and if the grant of representative government is revoked the Crown's ordinary legislative powers revive[10].

By virtue of its prerogative to deal with conquered or ceded territory, the Crown has the power to assign territories to organised governments for administration and control[11].

1 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769, quoting at [31] the text at notes 1-2 (now notes 1, 3) from an earlier edition of this title; *Campbell v Hall* (1774) 20 State Tr 239 at 323; *Phillips v Eyre* (1870) LR 6 QB 1. See also the Colonial Laws Validity Act 1865 ss 2, 3; but it seems that such an exercise of power may be held invalid by courts in the United Kingdom, on grounds of illegality, irrationality or procedural impropriety, even if, by virtue of those provisions of the 1865 Act, they could not be so challenged in the courts of the overseas territory: *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769; and see PARA 812. Cf *Globe Advertising Co v Johannesburg Town Council* [1903] TS 335 at 343, Transvaal SC; *Abeyesekera v Jayatilake* [1932] AC 260, PC; *Sammut v Strickland* [1938] AC 678, [1938] 3 All ER 693, PC.

2 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [47]-[48], [114], [120], [132], [2008] 4 All ER 1055 at [47]-[48], [114], [120], [132], [2008] 3 WLR 955 at [47]-[48], [114], [120], [132], [2008] 5 LRC 769 at [47]-[48], [114], [120], [132]; cf *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 377; and see PARA 817.

3 *Jephson v Riera* (1835) 3 Knapp 130, PC. Note that the Colonial Laws Validity Act 1865 s 3, in so far as it relates to the making of colonial law by Order in Council, does not prevent challenge to the law's validity on the ground that its making was irrational, illegal or procedurally improper (*R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769) or even, it seems, on the ground that its content is repugnant to the law of England, provided that the issue be raised in the courts of the United Kingdom (see *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [40], [68], [142], [2008] 4 All ER 1055 at [40], [68], [142], [2008] 3 WLR 955 at [40], [68], [142], [2008] 5 LRC 769 at [40], [68], [142], in which it is said that the relevant Order in Council is not a colonial law within the meaning of the Colonial Laws Validity Act 1865 s 3).

4 See the Colonial Laws Validity Act 1865 s 5.

5 See *Sammut v Strickland* [1938] AC 678 at 704, PC (a power of revoking the grant must be reserved or it will not exist); *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 279, CA, per Salmon LJ; *Wacando v Commonwealth of*

Australia (1981) 37 ALR 317 at 324, 332, Aust HC. The constant practice of both the Crown and Parliament seems to have been based on the assumption that even the Crown's constituent power must be reserved if it is to survive the grant of a representative legislature. But contrast Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) pp 158-162.

6 Compare and distinguish *Re Cape Breton* (1846) 5 Moo PCC 259 at 273, where the Crown conceded that, in relation to the island of Cape Breton, rights and privileges once vested in the inhabitants by act of the prerogative could not afterwards be removed by act of the Crown; in that case, however, the inhabitants had not acquired the right to have a separate assembly called for the island, but only the right to vote for representatives in the general assembly of the province with which they were united.

7 See *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 293, CA, per Lord Denning MR, and at 299 per Russell LJ.

8 *Campbell v Hall* (1774) 20 State Tr 239 at 323; *Abeyesekera v Jayatilake* [1932] AC 260, PC; *Sammut v Strickland* [1938] AC 678, PC. Where the Crown's power of ordinary or general legislation (ie for the peace, order and good government of the territory) is reserved, that power as such must be exercised subject to the Constitution of the colony: see *Chenard & Co v Arissol* [1949] 2 AC 127 at 132, PC; *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 293, CA, per Lord Denning MR. It is therefore a normal practice, when reserving powers to the Crown, to reserve expressly both the constituent power of altering or revoking the Constitution and the power of ordinary or general legislation: see eg PARA 859 text and note 3.

9 *Abeyesekera v Jayatilake* [1932] AC 260, PC.

10 *Sammut v Strickland* [1938] AC 678, PC.

11 For an exercise of this power see PARA 768 text to note 5.

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808 The Crown's competence in conquered or ceded colonies.

NOTES 1-3--*Bancoult*, cited, reported at [2009] 1 AC 453.

NOTE 2--See also PARA 806.

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809. The Crown's power to define or alter boundaries.

The boundaries of the various territories are regularly defined in statutes, or Letters Patent, or Orders in Council, and frequently in the instruments establishing the Constitution. The boundaries of any colony may be altered by Order in Council or Letters Patent[1].

1 Colonial Boundaries Act 1895 s 1(1). As to the retrospective effect of that provision see *Wacando v Commonwealth of Australia* (1981) 37 ALR 317, Aust HC; *Cantley v Queensland* (1973) 1 ALR 329, Aust HC. It is not clear whether there is or was a prerogative power to alter boundaries (see eg *State of South Australia v State of Victoria* [1914] AC 283, 18 CLR 115, PC; *Damodhar Gordhan v Deoram Kanji* (1875) 1 App Cas 332 at 363-368, 373, PC; and as to the prerogative power to extend Her Majesty's dominions see also *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 753-754, [1967] 3 All ER 663 at 680, CA, per Diplock LJ; *Wacando v Commonwealth of Australia* (1981) 37 ALR 317 at 323, Aust HC); such a power seems in accordance with principle, at least where its exercise would not affect jurisdictions resting on statute (at least, imperial statute) nor directly affect the rights of Her Majesty's subjects or the jurisdiction of a representative legislature (see *Damodhar Gordhan v Deoram Kanji* (1875) 1 App Cas 332 at 382, PC; *R v Gomez* (1880) 5 QSCR 189, Qld FC). For the history of the Crown's prerogative to define, as distinct from alter, the boundaries of its territories, and as to the relevance of responsible government to the extent of the prerogative in these matters see *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 702-706, 716-721, Aust HC; affd without deciding these points in *State of South Australia v State of Victoria* [1914] AC 283, 18 CLR 115, PC. See also PARAS 855 note 3, 856 note 1.

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810. External relations.

Her Majesty's government in the United Kingdom is internationally responsible for the external affairs of British overseas territories and other United Kingdom dependencies[1]. Thus the acceptance by the United Kingdom of an international convention will create international obligations and liabilities on the part of the United Kingdom in respect of the dependent territories unless the territorial application of the convention is expressly or impliedly limited to the United Kingdom or to a portion of those dependencies. But no treaty will alter the rights and duties of citizens under the law of a dependent territory unless that law is altered by United Kingdom legislation extending to that territory as part of the law of the territory or by local legislation[2].

A declaration of war or peace by the United Kingdom government binds all colonies, and binds all other dependent territories provided the intention to bind them is clearly expressed[3].

1 As to these other dependencies, ie the Channel Islands and the Isle of Man, see PARA 790 et seq.

2 *Jersey Fishermen's Association v States of Guernsey* [2007] UKPC 30, [2008] 1 LRC 198, [2007] All ER (D) 39 (May); *R (on the application of Bancoult) v Secretary of State for Foreign Commonwealth Affairs (No 2)* [2008] UKHL 61 at [47], [2008] 4 All ER 1055 at [47], [2008] 3 WLR 955 at [47], [2008] 5 LRC 769 at [47]; *R (on the application of Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 577; and see PARA 717. See also *A-G for Canada v A-G for Ontario, Re Weekly Rest in Industrial Undertakings Act* [1937] AC 326, 106 LJPC 72, PC; cf *Walker v Baird* [1892] AC 491, PC. On those occasions when the United Kingdom government uses its powers with respect to the external affairs of its dependencies to secure arrangements whereby the governments of those dependencies incur direct obligations, the United Kingdom government accepts international responsibility for the performance of those obligations. Occasionally, the government of a dependent territory may, with the consent of the United Kingdom government, enter into a commercial treaty or other (eg postal) arrangements with a foreign state.

3 *The Ionian Ships* (1855) 2 Ecc & Ad 212.

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810 External relations.

NOTE 2--*Bancoult*, cited, reported at [2009] 1 AC 453.

811. Financial control and assistance by the United Kingdom government.

The Constitution of a British overseas territory may make special provision for ensuring that, during any period when the control of the finances of the territory rests with Her Majesty's government in the United Kingdom as a condition of financial assistance from Her Majesty's exchequer, the Governor may act in his discretion against the advice of his executive council, or in some territories may exercise his reserved power of legislating, in order to secure the economic and financial stability of the territory or to ensure that any condition attached to the financial grants or loans from the United Kingdom government is complied with[1].

1 See eg the St Helena Constitution Order 1988, SI 1988/1842, Sch 2 s 34(1)(b) (prospectively revoked: see PARA 862).

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812. Limitations on, and liability of, United Kingdom public authorities in relation to dependent territories.

Even when the United Kingdom has extended the European Convention on Human Rights to a British overseas territory or other dependent territory by declaration under that Convention[1], with the effect of rendering the United Kingdom internationally liable for breaches of that Convention within the territory, United Kingdom public authorities (such as the Secretary of State) are not liable for those breaches under the Human Rights Act 1998 unless they occur in an area of the dependent territory which, like a United Kingdom diplomatic post or military base, is within the jurisdiction of the United Kingdom for the purposes of article 1[2] of the Convention[3]. It is for the dependent territory's own legislation to give effect to Convention rights[4]. But where the Secretary of State, the Privy Council or one of its committees, or another United Kingdom public authority is involved in legislative or executive action in the United Kingdom in relation to an overseas territory (such as legislating for the territory, or giving directions for or approval to actions of its legislature), such action will not only be subject to judicial review for rationality, legality or procedural propriety[5], but may also, where the territory is the subject of a declaration such as is mentioned above[6], be declared to be in breach of the Convention, be quashed for such breach, or give rise to liability under the 1998 Act[7].

1 Ie under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 56.

2 Ie for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 1, which obliges parties to the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in s I (arts 2-18).

3 *R (on the application of al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685, [2008] 1 LRC 618.

4 *R (on the application of al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 at [134], [2008] 1 AC 153 at [134], [2007] 3 All ER 685 at [134], [2008] 1 LRC 618 at [134].

5 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055 [2008] 3 WLR 955, [2008] 5 LRC 769; contrast the Colonial Laws Validity Act 1865 ss 1-3 (colonial laws, including an Order in Council made for a colony, not void or inoperative on the grounds of repugnancy to the law of England).

6 See note 1.

7 *R (on the application of al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 All ER 685, [2008] 1 LRC 618; *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319, [2009] 2 WLR 1205, [2008] All ER (D) 32 (Dec).

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812 Limitations on, and liability of, United Kingdom public authorities in relation to dependent territories

NOTE 3--See *R (on the application of Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7, [2010] 1 All ER 271, [2009] 3 WLR 957.

NOTE 5--*Bancoult*, cited, reported at [2009] 1 AC 453.

NOTE 7--*Barclay*, cited, affirmed: [2009] UKSC 9 at [100], [108]-[111], [117], [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

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813. Control by United Kingdom courts.

No writ of habeas corpus may issue from an English court to any colony or foreign dominion or possession of the Crown abroad[1] where there is a court which can issue the writ and ensure its due execution[2]. But English courts have sometimes assumed jurisdiction to issue lesser prerogative orders such as quashing orders to any place under the Crown's subjection, notwithstanding the existence of effective local courts and the consequent possibility that at the highest levels of appeal there might be contradictory judgments in the same cause[3].

1 These terms are interpreted to mean that the prohibition does not extend beyond territories (such as protectorates or protected states) outside Her Majesty's dominions in the strict territorial sense: *Ex p Mwenya* [1960] 1 QB 241, [1959] 3 All ER 525, CA; *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576, CA.

2 Habeas Corpus Act 1862 s 1; and see *Ex p Brown* (1864) 5 B & S 280; *Re Keenan* [1972] 1 QB 533, [1971] 3 All ER 883, CA. This prohibition does not affect any right of appeal to Her Majesty in Council: Habeas Corpus Act 1862 s 2. See also **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 215.

3 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, [2001] 3 LRC 249, DC (overruled on other grounds by *R (on the application of Bancoult) v Secretary of State for Foreign Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769); *R v Cowle* (1759) 2 Burr 834 at 855-856 per Mansfield CJ; *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 290, [1964] 3 All ER 377 at 378-379, CA, per Denning MR; *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576, CA; cf *Re Mansergh* (1861) 1 B & S 400.

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813 Control by United Kingdom courts

NOTE 3--*Bancoult*, cited reported at [2009] 1 AC 453.

(3) THE EXECUTIVE IN BRITISH OVERSEAS TERRITORIES

(i) The Governor

814. Governors and other officers administering government.

The term 'Governor' usually means any officer appointed[1] by the Crown to administer the government of a dependent territory[2]. In constituting his office, provision is always made for the administration of the government in case of a vacancy or the absence or incapacity of the Governor. Usually there is also an authorisation for the Governor to appoint a deputy with such powers as the Governor thinks fit whenever he is about to be absent from the capital, or to visit a dependency (or, sometimes, an adjacent territory), or when temporarily incapacitated through illness; but the Governor retains all his own powers.

1 Quaere whether there is any contractual relationship between the Crown and a person so appointed: cf *Kodeeswaran v A-G of Ceylon*[1970] AC 1111 at 1118, PC. It is not necessary for a Governor to be re-appointed on a demise of the Crown: Demise of the Crown Act 1901 s 1(1).

2 See eg the British Nationality Act 1981 s 50(1) (definition amended by the British Overseas Territories Act 2002 s 1(1)(b)). In the British Antarctic Territory and the British Indian Ocean Territory, this officer is styled the Commissioner: see eg the British Indian Ocean Territory (Constitution) Order dated 10 June 2004, ss 4, 5, 10, 12, 14. In protectorates and other dependencies outside Her Majesty's dominions the Crown's representative was usually styled 'High Commissioner'.

815. Emoluments and pensions.

The salary and other emoluments of a Governor are determined by the law of the territory whose government he is administering; that law may also make provision for a grant of pension to the Governor, but general provision for grants of pensions to Governors and administrators of the governments of any British dependencies is made by a scheme administered by the Secretary of State under the Overseas Pensions Act 1973[1].

1 Overseas Pensions Act 1973 s 2(1), (2), Sch 1 (s 2(1), (2) amended by the Oversea Superannuation Act 1991 s 1(2); the Police and Magistrates' Courts Act 1994 Sch 5 para 1; the Police Act 1996 Sch 7 para 22; the Police (Northern Ireland) Act 1998 Sch 4 para 7; the Police (Northern Ireland) Act 2000 s 78(2)(c); and the International Development Act 2002 Sch 3 para 5). Pensions, gratuities and allowances under that scheme may be increased by order: Pensions (Increase) Act 1971 ss 3, 5, Sch 2 Pt I paras 27, 27A (amended by the Superannuation Act 1972 Sch 6; the Overseas Pensions Act 1973 s 4(3); the Pensions (Increase) Act 1974 s 3(2), (3); the Social Security Pensions Act 1975 Sch 4 para 18; the Children Act 1975 Sch 4 Pt I; the Pensions (Miscellaneous Provisions) Act 1990 s 1(1), (2)(a), (b), (3)(a), (b), (c), (4); the Pensions Act 1995 ss 171, 177, Sch 7 Pt IV; the Welfare Reform and Pensions Act 1999 s 39(1), (2); and by SI 1972/1299; SI 1974/1264; SI 1979/1451). As to the Secretary of State see PARA 708 note 4.

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816. Nature of the Governor's authority.

The Governor of a colony is the single and supreme authority responsible to, and representative of, Her Majesty, and is entitled by virtue of his Commission and the Order in Council constituting his office to the obedience, aid and assistance of all civil and military officers in the territory. His authority from the Crown is, however, limited; he cannot be regarded as a viceroy, nor can it be assumed that he possesses general sovereign power[1]. His authority is confined to the powers thereby expressly or impliedly entrusted to him[2], including such prerogatives as may be delegated[3], and the statutory powers of the office. The scope of these powers may be examined by the courts and will not be interpreted on the assumption that wide or unfettered authority will naturally be bestowed[4]; where the Governor has power to interfere with the personal liberty of the inhabitants of the territory, that power will be strictly construed[5].

1 *Cameron v Kyte* (1835) 3 Knapp 332 at 343-344, PC; *Hill v Bigge* (1841) 3 Moo PCC 465 at 476; *Sprigg v Sigcau* [1897] AC 238, PC; *Hochoy v National Union of Government Employees* (1964) 7 WIR 174 (Trinidad and Tobago CA).

2 *Musgrave v Pulido* (1879) 5 App Cas 102 at 111, PC.

3 See *Dewar v Smith* [1900] SALR 38, S Aust SC (no delegation to Governor of prerogative of granting a ferry).

4 See eg *Sprigg v Sigcau* [1897] AC 238, PC; *Commercial Cable Co v Government of Newfoundland* [1916] 2 AC 610, PC.

5 *Musson v Rodriguez* [1953] AC 530, PC; and see also *De Verteuil v Knaggs* [1918] AC 557, PC; *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662, PC.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/4. BRITISH OVERSEAS TERRITORIES/(3) THE EXECUTIVE IN BRITISH OVERSEAS TERRITORIES/(i) The Governor/817. Royal Instructions to Governors.

817. Royal Instructions to Governors.

Royal Instructions under the sign manual and signet are issued and published in respect of the office of Governor in British overseas territories[1]. Governors of such territories also receive further instructions, written and otherwise, given through the Secretary of State[2].

The legal force of all such Royal Instructions is in general unclear[3], but in particular cases they may be given legal (though not necessarily mandatory) force by statute[4] or by the Order in Council constituting the office of Governor or the legislative assembly[5]. Such legal force is subject, however, to the rule that no colonial law is invalid by reason of non-compliance with Royal Instructions not actually contained in the instrument authorising the Governor to assent to the law[6].

1 For modern common-form Royal Instructions see eg the Turks and Caicos Islands Royal Instructions 1988 dated 26 February 1988 (SI 1988 I p 1836).

2 The giving of such instructions is an act of government of Her Majesty's ministers in the United Kingdom, done in the interests not only of the territory but also, it may be, of the United Kingdom and its other dependencies and overseas territories: *R (on the application of Bancoult) v Secretary of State for Foreign Commonwealth Affairs (No 2)* [2008] UKHL 61 at [47]-[48], [114], [120], [132], [2008] 4 All ER 1055 at [47]-[48], [114], [120], [132], [2008] 3 WLR 955 at [47]-[48], [114], [120], [132]; [2008] 5 LRC 769 at [47]-[48], [114], [120], [132]; cf *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 577.

3 Compare Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) pp 146-149 with Swinfen [1968] Juridical Review 21.

4 See the British Settlements Act 1887 s 3; and the British Settlements Act 1945 s 1.

5 See *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1152-1154, 1157, 1159, 1161, PC (prohibitions in Royal Instructions may be enforced by injunction or declaration). It is now usual for the instrument constituting the office of Governor and principally defining his powers and duties to provide specifically that the Governor is to exercise all his powers according to such instructions, if any, as Her Majesty may give him, but that the question whether he has in any matter complied with such instructions may not be inquired into by any court.

6 Colonial Laws Validity Act 1865 s 4; and see also PARA 831 note 7.

UPDATE

817 Royal Instructions to Governors

NOTE 2--*Bancoult*, cited, reported at [2009] 1 AC 453.

818. The Governor and responsible government.

The transition from the simplest forms of direct rule by the Governor (as, for example, in the British Indian Ocean Territory) to fully responsible government is effected, not by withdrawing most of his legal powers[1], but rather: (1) by requiring[2] the Governor to act (at first in respect of certain matters and then in respect of all but a few[3]) on the advice of the Executive Council or Council of Ministers collectively responsible to the local legislature; and (2) by delegation of many of the powers conferred by statute on the Governor to ministers responsible to the legislature. In Constitutions providing for responsible government there is normally a provision that where the Governor is required by the Constitution to perform any function in accordance with the advice of, or after consultation with, any other person or authority, the question whether he so exercised that function may not be inquired into in any court of law[4].

1 Among the powers, rights or duties of the Governor which will be withdrawn in effecting the transition to responsible government will be his right or duty of presiding over the legislative body.

2 The requirement will commonly be imposed, under modern conditions, by express constitutional provisions, but it may be imposed by convention, the legal force of which might even be recognised judicially: see *Commercial Cable Co v Government of Newfoundland* [1916] 2 AC 610, PC (concerning a convention or practice whereby contracts entered into by the Governor in his public capacity required the approval of the House of Assembly of Newfoundland); and see the comments obiter in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147-148, Aust HC.

3 The fact that the Constitution expressly empowers the Governor to exercise specified functions in his own discretion does not entail that every other function must under all circumstances be exercised in accordance with the advice of the Cabinet: see *Adegbenro v Akintola and Aderemi* [1963] AC 614 at 633, [1963] 3 All ER 544 at 551, PC (as to the Governor's power to remove the Premier). As to the legal effect of express constitutional provisions on this matter see *Teh Cheng Poh v Public Prosecutor, Malaysia* [1980] AC 458 at 466, 472-473, PC.

4 See eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 40(6).

819. Governor: emergency powers.

If the Governor of a specified colonial territory[1] is satisfied that a public emergency[2] exists, he may issue a proclamation[3] bringing into operation in relation to the territory, or part of the territory, powers which enable him to make emergency regulations[4]. Thereupon such regulations may be made as appear to the Governor[5] to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order[6] and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community[7]. In particular, the regulations may provide for the detention of persons and the deportation of persons from the territory; for the requisition of property and undertakings and the acquisition of property other than land; for entry upon and search of any premises; for the amendment and suspension of any law; for fees for the grant of licences, permits, etc; for compensation and remuneration to persons affected by the regulations; and for the apprehension, trial and punishment of offenders (but not trial by military courts)[8]. Orders and rules may be made in pursuance of powers conferred by the regulations[9], and these and the regulations themselves have effect notwithstanding that they may be inconsistent with any law[10].

1 The specified territories are those listed in the Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) Sch 1 (Sch 1 amended by SI 1963/88; SI 1963/1633; SI 1964/267; SI 1964/1199; SI 1965/131; SI 1968/724; SI 1973/759). Despite amendment, the list still contains the names of many territories to which the Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) no longer extends as part of their respective law. Where a territory does not appear in the list it will be found that the Constitution of that territory, or a local statute, or a special Order in Council, makes provision for the making of emergency laws, provision which in many but not all cases is similar to that indicated in the text to notes 2-10. As to provision for emergency in territories in which constitutional provision is made for the protection of fundamental rights see PARA 852.

2 A public emergency is a state of affairs calling for drastic action: see *Bhagat Singh v King-Emperor* (1931) LR 58 Ind App 169, PC; *Ningkan v Government of Malaysia* [1970] AC 379 at 390, PC.

3 Whether such a proclamation can be challenged before the courts on any ground is an unsettled and debatable question: *Ningkan v Government of Malaysia* [1970] AC 379 at 392, PC.

4 Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621).

5 These words do not allow the Governor to do whatever he may feel inclined to; what he does must be capable of being related to one of the prescribed purposes: see *A-G for Canada v Hallett and Carey Ltd* [1952] AC 427 at 450, PC; cf *Bhagat Singh v King-Emperor* (1931) LR 58 Ind App 169, PC; *King-Emperor v Benoari Lal Sarma* [1945] AC 14, [1945] 1 All ER 210, PC.

6 The imposition of a collective fine or punishment on all inhabitants of an area is capable of being related to 'securing the public safety' and to 'the maintenance of public order': *Ross-Clunis v Papadopoullos* [1958] 2 All ER 23, [1958] 1 WLR 546, PC.

7 Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) s 6(1).

8 Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) s 6(2). Where the regulations confer on the Governor powers which affect the liberty of the subject, the Governor may not delegate those powers unless the regulations expressly enable him to do so: *Mungoni v A-G of Northern Rhodesia* [1960] AC 336 at 347, [1960] 1 All ER 446 at 448, PC.

9 Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) s **7**.

10 Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) s 8. It is unlikely that emergency regulations would prevail against the provisions of a subsequent Act of the United Kingdom Parliament extending to the territory as part of its law. As to the proof of documents in courts of law see s 9.

820. Civil responsibility of Governor for his acts.

A Governor may be sued in the courts of the territory in respect of private claims whether arising within or without the territory[1]. He may also be sued both in the territory in respect of official acts which are tortious or ultra vires there, and in England if the act is tortious in England and not justifiable by the law of the territory[2]. What must be considered in each case is whether the action was one which the Governor was authorised to do, and whether it was an action which he could legally be immune in doing[3]. Civil liability can be barred locally by an Act of Indemnity, even if the Governor is a party to the Act, and such indemnification will be sufficient to bar action in England[4].

As the Governor does not have the status of a viceroy[5], he is not exempt from giving evidence in court proceedings, but official documents acquired and held by him, in his capacity of Governor and subject to the directions of the Secretary of State[6], are prima facie privileged from disclosure in legal proceedings. Such documents include copies of dispatches, reports, and other communications between himself as Governor and the Secretary of State, or between himself as Governor and a Royal Commissioner appointed by Her Majesty to inquire into the affairs of the colony, or between the Royal Commissioner and the Secretary of State[7]. It has been the rule that official communications between the Governor and his subordinate officers, civil or military, cannot be called for in actions against the Governor[8].

1 *Hill v Bigge* (1841) 3 Moo PCC 465. It seems that he would not be liable to imprisonment in execution of judgment: cf *Cameron v Kyte* (1835) 3 Knapp 332 PC; *Hill v Bigge* (1841) 3 Moo PCC 465 at 478. He cannot be sued for contracts made in his official capacity: *Macbeath v Haldimand* (1786) 1 Term Rep 172.

2 *Mostyn v Fabrigas* (1774) 1 Cowp 161; *Glynn v Houston* (1841) 2 Man & G 337 (evidence as to Governor's responsibility); *Wall v M'Namara* (1779) cited in 1 Term Rep 536; *Comyn v Sabine* (1738) cited 1 Cowp 169.

3 See *Musgrave v Pulido* (1879) 5 App Cas 102 at 107, 111, PC; *De Verteuil v Knaggs* [1918] AC 557, PC; and see also *Hunt v Gordon* (1880) 3 Fiji LR 1, Fiji SC; *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662, PC; *Kyriakides v Palmer* (1939) XVI Cyprus LR 15, Cyprus SC (it is contrary to public policy to permit the Governor to be sued for libel in respect of a publication or writing by him which can reasonably be seen to relate to methods and policy of governing the territory).

4 *Phillips v Eyre* (1870) LR 6 QB 1, Ex Ch.

5 See PARA 816.

6 As to the Secretary of State see PARA 708 note 4.

7 *Anderson v Hamilton* (1816) 2 Brod & Bing 156n; *Hennessy v Wright* (1888) 21 QBD 509; and see *Conway v Rimmer* [1968] AC 910 at 946, [1968] 1 All ER 874 at 884, HL, per Lord Reid and at 965 and 897 per Lord Morris of Borth-y-Gest; cf *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.

8 *Wyatt v Gore* (1816) Holt NP 299; *Cooke v Maxwell* (1817) 2 Stark 183; and see *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL, per Lord Morris of Borth-y-Gest; cf *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL.

821. Criminal responsibility of Governor.

Any Governor charged with oppressing any of Her Majesty's subjects, or committing any other crime or offence within his command, may be tried before any competent court in England[1]. Any Governor (or any other British officer or ex-official) charged with committing an offence under the Official Secrets Acts 1911 to 1989, anywhere within or without Her Majesty's dominions, may be brought to trial either before any competent British court in the place where the offence is alleged to have been committed, or in England[2].

1 Criminal Jurisdiction Act 1802 s 1 (amended, as to the courts having jurisdiction in England, by the Criminal Justice Act 1948 Sch 10 Pt I, and extended to crimes which would formerly have been felonies by the Criminal Law Act 1967 Sch 2 para 15(1), Sch 3 Pt III; further amended by the Statute Law (Repeals) Act 1995). Governors will not be liable under the Criminal Jurisdiction Act 1802 in respect of actions which were authorised by the local law of the territory: *R v Picton* (1805) 30 State Tr 225 at 536 per Lord Ellenborough; *R v Picton* (1808) 30 State Tr 805 at 864 per Lord Ellenborough. See also the Offences against the Person Act 1861 ss 9, 57 (amended by the Criminal Justice Act 1925 Sch 3; and the Criminal Law Act 1967 Sch 3 Pt III) (murder or manslaughter; bigamy); and *R v Eyre* (1868) LR 3 QB 487.

2 See the Official Secrets Act 1911 s 10(2) (amended by Criminal Justice Act 1948 Sch 10 Pt I; and the Criminal Law Act 1967 Sch 3 Pt I); and the Official Secrets Act 1920 s 8(3). Any act done by a British citizen or Crown servant, or by any person in any of the Channel Islands or any colony, will be an offence, if it would be an offence under a provision of the Official Secrets Act 1989 (other than against s 8(1), (4) or (5) (retention of documents)) when done in the United Kingdom: Official Secrets Act 1989 s 15(1). See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 483.

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(ii) Public Officers

822. Tenure and character of office.

The general principle that appointments to public office[1] were made by royal authority and that no servant of the Crown held office otherwise than at pleasure[2] has given way to a presumption that public officers, including the police, have a contract of service with the Crown, but where (as in British overseas territories with responsible government) there is constitutional or other provision for a Public Service Commission (with or without analogous commissions for the police or the teaching service)[3] they are protected against political interference in their tenure[4]. Special provisions for safeguarding judicial tenure are now almost universal[5].

Officers are liable in law for all tortious acts committed by themselves or on their direct orders, but not for contracts entered into by them for the Crown[6].

1 As to what is and is not public office see *Perch v A-G of Trinidad and Tobago*[2003] UKPC 17, [2003] 5 LRC 508, [2003] All ER (D) 324 (Feb).

2 As to the rule of tenure at pleasure see *Shenton v Smith*[1895] AC 229, PC; *Dunn v R*[1896] 1 QB 116, CA; *Dunn v Macdonald*[1897] 1 QB 555 at 556, CA, per Lord Esher MR; *Venkata Rao v Secretary of State for India*[1937] AC 248, PC; *Reilly v R*[1934] AC 176, PC; *Rodwell v Thomas*[1944] KB 596, [1944] 1 All ER 700; *Terrell v Secretary of State for the Colonies*[1953] 2 QB 482, [1953] 2 All ER 490; *Riordan v War Office*[1959] 3 All ER 552, [1959] 1 WLR 1046; *A-G for Guyana v Nobrega*[1969] 3 All ER 1604, PC. From the fact that the Secretary of State's Colonial Regulations as to appointment to public offices do not purport to create any contract between the Crown and its servants, it did not follow that there was no contract of service between the Crown and its servants: see eg *Kodeeswaran v A-G of Ceylon*[1970] AC 1111, PC; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the Secretary of State see PARA 708 note 4.

3 See eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 92(1) (power to appoint to, remove from, and exercise disciplinary control over persons in public office vests in the Governor, who acts in accordance with the advice of the Public Service Commission unless he determines that compliance with it would prejudice Her Majesty's service); s 92(2)-(9) applies mutatis mutandis to the Teaching Service Commission (s 93) and the Police Services Commission (ss 96, 97); ss 94-95 make different provision as to the Judicial and Legal Services Commission and appointments to, removal from, and disciplinary control over persons in legal offices.

4 As to the constitutional role of Public Service Commissions (in those territories where they exist) in insulating public officers from the power of the executive, especially in the context of party government, see *Thomas v A-G of Trinidad and Tobago*[1982] AC 113, PC; *Cooper v Director of Personnel Administration*[2006] UKPC 37, [2007] 1 WLR 101, [2007] 2 LRC 100.

5 As to judicial tenure thus specially provided for see PARA 836. In the absence of such special provision, judicial appointments would fall under the general rule of tenure at pleasure (Colonial Regulations (Pt I, Public Officers, 1971) reg 55; *Terrell v Secretary of State for the Colonies*[1953] 2 QB 482, [1953] 2 All ER 490), but even so, removal from judicial official office was made the subject of certain safeguards, eg those set out in the Colonial Regulations (Colonial Regulations (Pt I, Public Officers, 1971) regs 54(i), (iii), 59(xvi)).

6 *Macbeath v Haldimand* (1786) 1 Term Rep 172; *Dunn v Macdonald*[1897] 1 QB 401; and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

UPDATE

822 Tenure and character of office

NOTES 4, 5--Though the lower judiciary (such as magistrates appointed on one-year contracts) enjoy a lower level of security from dismissal than the higher judiciary, the constitutional importance of autonomous public and judicial service commissions with powers of discipline and removal is such that a broad interpretation should be given to provisions entrusting the 'power to remove' public or judicial officers to such commissions; and the constitutional protection afforded by such provisions must prevail over the terms of contracts of such officers with the authorities in the local jurisdiction: *Fraser v Judicial and Legal Services Commission*[2008] UKPC 25, [2009] 2 LRC 26, at [14]-[18].

823. Responsibility for salaries and pensions.

Each dependent territory is responsible for the salaries, pensions and other conditions of employment of its public servants, however they were appointed. When, in 1954, Her Majesty's Overseas Civil Service was constituted[1] for public officers appointed on a permanent and pensionable basis to a territory in which they were not domiciled, the United Kingdom government undertook no responsibility for their salaries or pensions other than to seek to enter into an agreement with the government of any territory attaining independence, to safeguard their rights and conditions[2].

However, since 1970 it has been the policy of the United Kingdom government: (1) to reimburse to the government of any overseas territory which has attained independence the cost of the pensions of certain overseas public officers[3] in respect of their service before independence; and (2) to enter into agreements under which the United Kingdom government would assume responsibility for the awards, administration and payment of certain pension benefits in respect of such overseas service both before and after independence[4].

Accordingly, under the Overseas Pensions Act 1973, the Secretary of State may make any payments which fall to be made by the United Kingdom government, or by any Minister of the Crown, in accordance with any agreement between that government and the government of an overseas territory[5] for the assumption by the United Kingdom government of responsibility for the payment of such pensions, allowances or gratuities as the agreement may provide[6]. Moreover, with the consent of the Treasury[7], the Secretary of State may make, maintain and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities which, subject to the fulfilment of any requirements and conditions prescribed by the schemes, are to be or may be paid by the Secretary of State to or in respect of specified classes of persons[8].

The United Kingdom government now supplements, in relation to changes in the cost of living in the United Kingdom[9], the pensions payable (whether by that government or the government of an overseas territory) in respect of a wide range of specified[10] overseas service in dependent and formerly dependent territories[11].

1 See in the first instance the Special Regulations appended to the White Paper Colonial no 306 (1954). Regulations constituting Her Majesty's Overseas Civil Service were promulgated by the Secretary of State for the Colonies in July 1954, constituting the Service on 1 October 1954: see Appointments Overseas, Colonial Office Paper OCS 3, HMSO (1960) App 2 pp 74-75.

2 See Appointments Overseas, Colonial Office Paper OCS 3, HMSO (1960) p 6, App 1 pp 71-83.

3 The officers concerned are those covered by the relevant public officers' agreement who were not, on 1 April 1971 or on retirement, citizens of the country awarding the pension: see the statement by the Minister of State, Foreign and Commonwealth Office, 337 HL Official Report (5th series), 21 December 1972, col 1212.

4 See the ministerial statement cited in note 3.

5 For these purposes, 'overseas territory' means any territory or country outside the United Kingdom and 'government of an overseas territory' includes a government constituted for two or more overseas territories, and any authority established for the purpose of providing or administering the services which are common to, or relate to any matters of interest to, two or more overseas territories: Overseas Pensions Act 1973 s 1(3).

6 Overseas Pensions Act 1973 s 1(1). For the purposes of giving effect to any such agreement and of making such consequential provision as he considers appropriate, the Secretary of State may, with the consent of the

Treasury, make, maintain and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities payable by the Secretary of State to or in respect of such of the persons to whom the agreement applies as he determines, and such other persons for whom it is appropriate, in his opinion, to provide pensions, allowances or gratuities in accordance with any such scheme: s 1(2); Transfer of Functions (Minister for the Civil Service and Treasury) Order 1981, SI 1981/1670, art 2, Schedule. Such schemes are made otherwise than by statutory instrument, but a copy must be laid before Parliament: Overseas Pensions Act 1973 s 3(8). For further specification of the Secretary of State's powers in respect of schemes see s 3(1)-(5), (9). As to the powers of the High Court in respect of such schemes see s 3(6), (7). As to the Secretary of State see PARA 708 note 4; and as to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

7 Ie exercising the functions of the Minister for the Civil Service: Transfer of Functions (Minister for the Civil Service and Treasury) Order 1981, SI 1981/1670, art 2, Schedule.

8 Overseas Pensions Act 1973 s 2(1). These classes of person are: (1) persons who have served in any office or employment in respect of which pensions, allowances or gratuities were provided under certain United Kingdom enactments repealed by the Overseas Pensions Act 1973 and instruments made under those enactments; (2) any other persons for whom it is appropriate, in the opinion of the Secretary of State, to provide pensions, allowances or gratuities in accordance with any scheme made by the Secretary of State superseding or supplementing any provision made by or under any of those former enactments and instruments; (3) persons who served in the Central Office of the Overseas Audit Department; (4) members and constables of police forces engaged on specified kinds of overseas service who suffered incapacity or death as a result of that service; and (5) persons who are contributing or have contributed to the Overseas Superannuation Scheme: Overseas Pensions Act 1973 s 2(2) (amended by the Oversea Superannuation Act 1991 s 1(2); the Police and Magistrates' Courts Act 1994 Sch 5 para 1; the Police Act 1996 Sch 7 para 22; the Police (Northern Ireland) Act 1998 Sch 4 para 7; the Police (Northern Ireland) Act 2000 s 78(2)(c); and the International Development Act 2002 Sch 3 para 5). For further specification of the powers of the Secretary of State in respect of schemes see the Overseas Pensions Act 1973 s 3(1)-(5), (9). As to the powers of the High Court in respect of such schemes see s 3(6), (7).

9 See the Social Security Pensions Act 1975 ss 59, 59A (s 59 amended by the Social Security Act 1979 ss 11(1)-(3), 21(4), Sch 3 para 20; the Social Security Act 1985 s 29(1), (2), Sch 5 para 33, Sch 6; the Social Security Act 1986 s 9, Sch 10 Pt V para 93; the Pensions (Miscellaneous Provisions) Act 1990 ss 1(7), 5(1), (2); the Pension Schemes Act 1993 Sch 8 para 9(1)(b); and the Social Security (Consequential Provisions) Act 1992 Sch 2 para 34; prospectively amended by the Pensions Act 2008 s 137(1)-(8), Sch 11 Pt 6, as from a day to be appointed under s 149(1), (6); the Social Security Pensions Act 1975 s 59A added by the Social Security Act 1979 s 11(4); and amended by the Social Security Act 1986 s 9(9); and the Pension Schemes Act 1993 Sch 8 para 9(2)).

10 See the Pensions (Increase) Act 1971 ss 10, 11(2), (3), 11A(2), (3), 12(2), Schs 4, 5 (s 11(2), Sch 4 amended, and s 11A added, by the Overseas Pensions Act 1973 s 4(1), Sch 2).

11 See the Pensions (Increase) Act 1971 ss 10, 11(1), 11A(1), 12(1) (s 11A as added: see note 10); and the Overseas Service (Pensions Supplement) Regulations 1995, SI 1995/238.

(4) LEGISLATURES OF BRITISH OVERSEAS TERRITORIES

(i) The Legislative Bodies and their Privileges

824. Membership of legislatures of British overseas territories.

The right to determine any question whether any person has been validly elected or appointed a member of the legislature of a British overseas territory, or whether any member has vacated his seat or is otherwise required to cease performing his functions as a member, rests in the legislative body concerned unless that right has been surrendered by legislation[1]. It is now the practice in all cases for the constituent instrument in a territory to provide that the Supreme Court or High Court has jurisdiction to hear and determine any such question, and that no appeal lies from that court's decision. This provision is effective to exclude any right of appeal to the Judicial Committee of the Privy Council, which will not grant special leave to appeal in any such case[2].

The legislature of a British overseas territory is not disqualified from transacting business, and its proceedings are not invalidated, merely by reason of vacancies in the membership of that body[3].

The Governor may at any time[4] prorogue or dissolve the legislature, but this is an executive act of the Crown, not a participation in the legislative process to which the doctrines of parliamentary or legislative privilege apply[5].

1 *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31 at 38, [1967] 2 All ER 34 at 36, PC.

2 As to the refusal of the Privy Council to entertain any appeal from the final determination of an election judge see *Russell v A-G for Saint Vincent and the Grenadines* [1997] 1 WLR 1134, [1997] 3 LRC 371, PC; *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31, [1967] 2 All ER 34, PC; *Théberge v Laudry* (1876) 2 App Cas 102, PC; *Kennedy v Purcell* (1888) 59 LT 279, PC; *Lord Strickland v Grima* [1930] AC 285, PC; *De Silva v A-G for Ceylon* [1949] WN 248, PC; *Senanayake v Navaratne* [1954] AC 640, [1954] 2 All ER 805, PC; *Patterson v Solomon* [1960] AC 579, [1960] 2 All ER 20, PC; *Arzu v Arthurs* [1965] 1 WLR 675, PC.

3 *Fishwick v Cleland* (1960) 106 CLR 186, [1961] ALR 147, Aust HC. This is generally provided for in modern constituent instruments, which also provide that proceedings in a legislative body are valid notwithstanding that some person who was not entitled to do so took part in the proceedings. See eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 76. As to the effect of such provisions see *Farzand Ali v Province of West Pakistan* PLD 1970 SC 98, Pakistan SC.

4 The power of the Governor to bring about a dissolution at any time is not to be restricted, nor is the holding of elections to be prevented, by the failure to appoint a boundary commission, or by the failure of such a commission to complete its delineation of electoral boundaries: *Russell v A-G for Saint Vincent and the Grenadines* [1997] 1 WLR 1134, [1997] 3 LRC 371, PC.

5 *Cormack v Cope* (1974) 3 ALR 419 at 428, Aust HC, per Barwick CJ; and cf at 444 per Stephen J.

825. Privileges of legislatures of British overseas territories.

By common law the legislature of a British overseas territory does not inherently enjoy privileges of the sort established for the House of Commons by the law and custom of Parliament[1]; such a legislature inherently has only such privileges as are reasonably necessary for any legislative body to secure the due conduct of its proceedings[2]. Privileges so granted by implication of common law include absolute privilege in respect of statements by members of the legislature in the course of its proceedings[3], and the right to remove, suspend (but not for an indefinite period) or even expel a member for disorderly conduct[4] or other conduct inside or outside the House which substantially prejudices the orderly or proper exercise of its legislative functions[5]. Members of the public in general, and in particular individuals who by their offensive behaviour within the precincts of the legislative chambers prejudice the conduct of business of a House or its committees, may be expelled in the interests of order and decorum[6], but a legislative body of a British overseas territory lacks inherent power to punish either members or other persons by arrest and committal[7].

The relationships between the legislature and the local courts are regulated by the same general principles of parliamentary government as have been developed in the United Kingdom; thus, for example, the courts will not issue a mandatory order to compel the performance, by an officer of or under the control of a legislature, of a statutory duty to issue a writ for election of a member of the legislature[8]. However, the courts in a territory in which the powers and procedure of the legislature are regulated by law will be more ready than English courts are to investigate and make declarations as to the lawfulness of particular proceedings in the legislature or as to the sufficiency of such proceedings for the purpose of enacting valid legislation[9].

On the other hand, the powers of the legislatures to create privileges by law are bounded only by the general rule of repugnancy[10], and any specific constitutional limitations; much the most common limitation is that the privileges provided for locally must not exceed those of the House of Commons of the United Kingdom or the privileges of the members of that House[11]. If, therefore, legislation is passed adopting the privileges of the House of Commons they will be accorded recognition by the courts, and a committal for contempt on a Speaker's warrant in general terms, without specifying any particular offence, is accordingly valid[12].

1 As to the customs and privileges of Parliament see **PARLIAMENT** vol 78 (2010) PARAS 1 et seq, 1076 et seq.

2 *Kielley v Carson* (1842) 4 Moo PCC 63 at 88; *Fenton v Hampton* (1858) 11 Moo PCC 347; *Barton v Taylor* (1886) 11 App Cas 197 at 203, PC; *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1154, PC; *Sabaroche v Speaker of the House of Assembly* [1999] 3 LRC 584, Dominica CA; *Egan v Willis* [2000] 1 LRC 489, Aust HC.

3 *Chenard & Co v Arissol* [1949] 2 AC 127, PC; *Gipps v McElhone* (1881) 2 NSWLR 18 at 21.

4 *Doyle v Falconer* (1866) LR 1 PC 328 at 340; *Barton v Taylor* (1886) 11 App Cas 197 at 203, PC; cf *Harnett v Crick* [1908] AC 470, PC; *Syvret v Bailhache* [1999] 1 LRC 645, 673-83, Jersey, Royal Court (Samedi Division).

5 *Armstrong v Budd and Stevenson* [1969] 1 NSWR 649, NSW SC; *Egan v Willis* [2000] 1 LRC 489, Aust HC. But the right does not extend to contempts of a House not obstructive of the business of that House: *Landers v Woodworth* (1878) 2 SCR 158, Can SC.

6 *Payson v Hubert* (1904) 34 SCR 400, Can SC.

7 *Kielley v Carson* (1842) 4 Moo PCC 63; *Fenton v Hampton* (1858) 11 Moo PCC 347; *Doyle v Falconer* (1866) LR 1 PC 328.

8 *Temple v Bulmer* [1943] SCR 265, [1943] 3 DLR 649, Can SC. The legislature's privilege in relation to its internal proceedings is accorded by the courts to limit conflict of authority between courts and legislature; the mere fact that an impugned action is taken by the legislature or one of its officers does not confer automatic immunity on that action; to have such immunity the action must be constitutional, and of the kind to which the privilege extends, and there is a clear distinction between the summoning of the legislature and its proceedings once assembled: *Teangana v Tong* [2004] KICA 17, [2005] 3 LRC 588, Kiribati CA. See also note 9; and PARA 831 note 3.

9 *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196, PC; *Smith v Mutasa* [1990] LRC (Const) 87, Zimbabwe SC; *McDonald v Cain* [1953] VLR 411, [1953] ALR 965, Vict FC. But see further PARA 831 note 6.

10 As to representative colonial legislatures see the Colonial Laws Validity Act 1865 ss 3, 5; *Fielding v Thomas* [1896] AC 600 at 610, PC. As to other legislatures see *Chenard & Co v Arissol* [1949] 2 AC 127, PC; cf *Fielding v Thomas* [1896] AC 600 at 609, PC. As to repugnancy generally see PARA 829. See also PARA 827 note 8.

11 See eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 82.

12 *Dill v Murphy* (1864) 1 Moo PCCNS 487; *Re Dill* (1862) 1 W & W 171 (libel in newspaper article on Assembly); *Speaker of Victoria Legislative Assembly v Glass* (1871) LR 3 PC 560 (validity of Speaker's warrant). In interpreting the terms in which the privileges and immunities of members of a legislature of a British overseas territory are established, it will generally be proper to draw assistance from practice, conventions or rulings that govern the conduct of members of the House of Commons, supplemented by what can be learned of contemporary constitutional conventions and practices both in the United Kingdom and in the territory concerned: see *A-G of Ceylon v De Livera* [1963] AC 103 at 119-120, [1962] 3 All ER 1066 at 1068-1069, PC.

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825 Privileges of legislatures of British overseas territories

NOTE 9**--**See *Constitutional Reference No 1 of 2008* [2008] NRSC 7, [2009] 1 LRC 453, Nauru SC.

(ii) Legislative Powers

826. The legislature.

In each British overseas territory there is an authority, other than the United Kingdom Parliament or Her Majesty in Council, which is competent to make laws for the peace, order and good government of the territory[1]. Such an authority, whether it be the Governor acting alone or the Governor acting in conjunction with a body or bodies of other persons, is styled the legislature of that territory[2], and in the absence of express restrictions has various powers[3].

1 As to the legislative bodies see PARAS 824-825.

2 See the Interpretation Act 1978 ss 5, 22, Sch 1 sv 'colonial legislature', Sch 2 Pt I para 4(1). See also the Colonial Laws Validity Act 1865 s 1; and PARA 824. Note that the provisions of the Colonial Laws Validity Act 1865 do not apply to the Channel Islands or the Isle of Man: s 1 sv 'colony'.

3 See PARA 827 et seq.

827. Nature and extent of constituent and general legislative powers.

The grant of power to make laws for the peace, order (or welfare) and good government of a British overseas territory does not of itself authorise the making of laws for the alteration of the constitution or powers of the legislature[1]. By virtue of the Colonial Laws Validity Act 1865[2], however, every representative[3] colonial[4] legislature has power to make laws respecting its[5] constitution[6], powers[7] and procedure[8], provided that such laws are passed[9] in the manner and form[10] required by any law in force in the colony. The legislature of a British overseas territory does not have authority to ignore the conditions and restrictions upon law making which are imposed by the instrument or instruments conferring and regulating its power to make laws[11]; this rule holds whether the conditions or restrictions in question concern the manner and form[12] of legislating[13], or the subject matter of legislation[14], or the impingement of legislation on specified fundamental rights[15], or the requirements of a separation of legislative or executive powers from judicial powers[16]. Nor may such a legislature make laws which fail to satisfy the requirements of territorial nexus imposed by the doctrine of colonial extra-territorial legislative incompetence[17], or laws which are repugnant to Acts of the United Kingdom Parliament or to enactments made under such Acts[18].

Subject to these qualifications, the power to make laws for the peace, order and good government of a territory is to be construed, not as the power of a mere delegate, but as plenary and indeed sovereign within its limits[19]. The legislature of a British overseas territory thus has full and exclusive discretion in the exercise of its legislative power[20]. It may delegate its powers to subordinate bodies, provided that such delegation does not amount to abrogation of its power to a separate legislative body or to a conferring of general legislative power on another body[21]. It may affect the prerogatives of the Crown[22], although not so as to affect the exercise by the Crown in the United Kingdom of the Crown's legislative, executive or judicial powers in respect of the territory[23]. It may, if a representative legislature, bind its successors as to the manner and form of future law making[24], though not so as to abdicate its functions altogether[25]. Within any limits which may be imposed by its constitution on its powers and the manner of their exercise, the legislature of a British overseas territory may impliedly[26] as well as expressly repeal in whole or in part its own laws[27] and may make laws which are repugnant: (1) to the common law[28]; or (2) to United Kingdom statutes which are in force in the territory by virtue only of introduction on settlement or application by local law[29]; or (3) to any principles or rules of natural justice[30]. It may legislate retrospectively, retroactively or by deeming or validating provisions[31] or by Acts of indemnity[32].

1 *Chenard & Co v Arissol* [1949] 2 AC 127 at 132, PC; and see *Sabally and N'Jie v A-G* [1965] 1 QB 273 at 280 (on appeal [1965] 1 QB 273 at 293, CA); cf *Clayton v Heffron* (1960) 105 CLR 214, Aust HC, at 250-252 per Dixon CJ and at 270-273 per Menzies J.

2 Ie the Colonial Laws Validity Act 1865 s 5. As to the effect of this provision see generally *A-G for New South Wales v Trethowan* (1931) 44 CLR 394, Aust HC; affd [1932] AC 526, PC.

3 By 'representative legislature' is meant any colonial legislature which comprises a legislative body of which one-half or more of the members are elected by the local inhabitants: see the Colonial Laws Validity Act 1865 s 1; cf the Colonial Courts of Admiralty Act 1890 s 15.

4 What is said in PARAS 828-835 in respect of colonial legislatures and laws was generally applicable also to the legislature of a protectorate or trust territory: *R v Earl of Crewe, ex p Sekgome* [1910] 2 KB 576, CA; *Re Zaghlul* (1923) 67 Sol Jo 382, PC; *Jerusalem-Jaffa District Governor v Suleiman Murra* [1926] AC 321, PC. See also PARA 829 note 2.

5 The requirements of the Colonial Laws Validity Act 1865 s 5 are binding only in so far as they concern legislation affecting the constitution, powers and procedure of the legislature itself. See *South-Eastern Drainage Board of South Australia v Savings Bank of South Australia* (1939) 62 CLR 603, Aust HC; *Wenn v A-G for Victoria* (1948) 77 CLR 84 at 107, Aust HC, per Latham CJ.

6 Change in the qualifications of members of a legislature is not of itself a change in the constitution of that legislature: *Western Australia v Wilsmore* (1982) 40 ALR 213 at 230, Aust HC; and see also *A-G of Trinidad and Tobago v McLeod* [1984] 1 All ER 694, [1984] 1 WLR 522, PC. Quaere whether the legislature of a British overseas territory could avail itself of the Colonial Laws Validity Act 1865 s 5 to deprive itself of its representative character: see *Clayton v Heffron* (1960) 105 CLR 214 at 255, Aust HC, per Fullagar J. The power conferred by the Colonial Laws Validity Act 1865 s 5 probably does not include the power to eliminate the Crown from the legislative process; 'legislature' often includes the Crown, but in s 5 (and cf ss 1, 7) the expression can be taken as excluding the Crown: see *Taylor v A-G of Queensland* (1917) 23 CLR 457 at 473, Aust HC, per Isaacs J; *Clayton v Heffron* (1960) 105 CLR 214 at 251, Aust HC, per Dixon CJ. See also *Re Initiative and Referendum Act* [1919] AC 935 at 943, PC; *Re Scully* (1937) 32 Tas LR 3, Tas SC.

7 Cf the text to notes 21, 24, 25.

8 A law with respect to the privileges or immunities of members of the legislature, protecting them against actions in respect of their conduct as members, is not a law with respect to the procedure of the legislature within the meaning of the Colonial Laws Validity Act 1865 s 5: *Chenard & Co v Arissol* [1949] 2 AC 127 at 133, PC. See also PARA 825 note 10.

9 By 'passed' is meant 'enacted': *A-G for New South Wales v Trethowan* [1932] AC 526 at 541, PC.

10 A requirement as to reservation of bills, if contained in an instrument of one of the classes mentioned in the Colonial Laws Validity Act 1865 s 5, read with s 4 (see PARAS 817 text to note 6, 831 note 7), is a requirement as to 'manner and form' within the meaning of s 5: *A-G for New South Wales v Trethowan* (1931) 44 CLR 394 at 432, Aust HC, per Dixon J. As to requirements of 'manner and form' see further notes 12-14.

11 *Bribery Comr v Ranasinghe* [1965] AC 172, [1964] 2 All ER 785, PC; *Harris v Minister of the Interior* 1952 (2) SA 428, SA App Div; *Kariapper v Wijesinha* [1968] AC 717, [1967] 3 All ER 485, PC. A dictum in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 at 326, [1941] 2 All ER 93 at 99, PC, might be taken to suggest that the Colonial Laws Validity Act 1865 s 5 conferred legislative power to override restrictions imposed by particular provisions in Acts of the United Kingdom Parliament predating the Colonial Laws Validity Act 1865; cf *Re Scully* (1937) 32 Tas LR 3, Tas SC, which appears to rest on the view that the Australian Constitutions Act 1842 s 31 (repealed) was not overridden by the Colonial Laws Validity Act 1865 s 5, but was protected by s 2.

12 See the cases cited in notes 2, 11. Cf *South-Eastern Drainage Board of South Australia v Savings Bank of South Australia* (1939) 62 CLR 603, Aust HC (provision in a local law purporting to require a specified form of words in subsequent legislation on a certain topic is not a provision as to manner and form of the type given paramount force by the Colonial Laws Validity Act 1865 s 5). Cf also *Clayton v Heffron* (1960) 105 CLR 214, Aust HC (not every stipulation as to the manner and form of making laws respecting the constitution, powers or procedure of the legislature is given invalidating force and effect by the Colonial Laws Validity Act 1865 s 5); *Clydesdale v Hughes* (1934) 51 CLR 518, Aust HC; *Western Australia v Wilsmore* (1982) 40 ALR 213, Aust HC; *Kaseng v Namaliu* [1996] 2 LRC 1, PNG SC. Note that the distinction between requirements as to manner and form of law making and requirements as to subject matter or substance is often artificial, in as much as requirements as to manner and form will ordinarily have been imposed with respect to defined subject matters of legislation.

13 See further PARA 831.

14 See eg *Bribery Comr v Ranasinghe* [1965] AC 172 at 193-194, [1964] 2 All ER 785 at 789, PC; *Western Australia v Wilsmore* (1982) 40 ALR 213 at 225, 227-228, Aust HC. Western Australia v Wilsmore (1982) 40 ALR 213 at 225, 227-228, Aust HC. Where a duly enacted statute is believed by the government of the day to be unconstitutional, it is preferable to secure its repeal or devise a procedure to seek the opinion of the court, and it is not desirable to leave the statute unimplemented until action is brought against the government by a private citizen seeking constitutional redress: *Suratt v A-G of Trinidad and Tobago* [2007] UKPC 55 at [37], [2008] 1 AC 655 at [37], [2008] 4 LRC 502 at [37].

15 See generally PARA 850.

16 Such a separation of the judicial from the legislative power may be implied: *State of Mauritius v Khoyratty* [2006] UKPC 13, [2007] 1 AC 80, [2006] 4 LRC 403; *Liyanage v R* [1967] 1 AC 259, [1966] 1 All ER 650, PC; *Kariapper v Wijesinha* [1968] AC 717 at 732, [1967] 3 All ER 485 at 488, PC; *Kenilorea v A-G* [1986] LRC (Const) 126, Solomon Is CA (implied constitutional separation of powers infringed by legislative provision directed

specifically at litigation then pending). It is not to be assumed that the Constitution of British overseas territories and other territories in the Commonwealth necessarily or ordinarily imports such a separation of powers; see *Clyne v East* (1967) 68 SR (NSW) 385, [1967] 2 NSWR 483, NSW CA; *Nicholas v Western Australia* [1972] WAR 168, West Aust SC; *R v Humby, ex p Rooney* (1974) 2 ALR 659, Aust HC; *Hinds v R* [1977] AC 195, [1976] 1 All ER 353, PC; *John v DPP* [1985] 1 WLR 657, PC. But a principle of separation of judicial from executive functions will be more readily be inferred or acknowledged and imposed: *Griffith v R* [2004] UKPC 58, [2005] 2 AC 235, [2005] 3 LRC 759; *DPP of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411, [2003] 2 LRC 756; *Ali v R* [1992] 2 AC 93, [1992] 2 All ER 1, PC; *Greene Browne v R* [2000] 1 AC 45, [1999] 3 LRC 440, PC. Decisions on bail are intrinsically within the domain of the judiciary for the purposes of the application of the idea that there must be a total separation of judicial from legislative and executive powers, an idea implied and imposed by a constitutional provision that the state shall be a democratic one: *State of Mauritius v Khoyratty* [2006] UKPC 13, [2007] 1 AC 80, [2006] 4 LRC 403. On the separation of powers and the rule of law see also *Toussaint v A-G of Saint Vincent and the Grenadines* [2007] UKPC 48, [2008] 1 All ER 1, [2007] 1 WLR 2825, [2007] 4 LRC 755. Different Constitutions apply the principle of separation of powers in their own ways, and a court can concern itself only with the actual Constitution and not with what it thinks might have been an ideal one: *Boyce v R* [2004] UKPC 32, [2005] 1 AC 400, [2004] 4 LRC 749.

17 See PARA 828.

18 See PARA 829.

19 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769; *R v Burah* (1878) 3 App Cas 889, PC; *Hodge v R* (1883) 9 App Cas 117, PC; *Powell v Apollo Candle Co* (1885) 10 App Cas 282, PC; *Riel v R* (1885) 10 App Cas 675, PC; *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 at 442, PC; *McCawley v R* [1920] AC 691, PC; *Toronto Electric Comrs v Snider* [1925] AC 396, PC; *Croft v Dunphy* [1933] AC 156, PC; *British Coal Corpn v R* [1935] AC 500, PC; *Ibralebbe v R* [1964] AC 900 at 923, PC; *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, [1966] 2 All ER 913, PC; *Western Australia v Wilsmore* (1982) 40 ALR 213 at 227, Aust HC; *Winfat Enterprise (HK) Co Ltd v A-G of Hong Kong* [1985] AC 733, [1985] 3 All ER 17, PC; *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43, Aust HC.

20 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, [1941] 2 All ER 93, PC; *Jerusalem-Jaffa District Governor v Suleiman Murra* [1926] AC 321 at 327-328, PC; *Chenard & Co v Arissol* [1949] 2 AC 127, PC; and see the cases cited in note 19.

21 *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, [1966] 2 All ER 913, PC; and see *R v Burah* (1878) 3 App Cas 889, PC; *Hodge v R* (1883) 9 App Cas 117, PC; *Powell v Apollo Candle Co* (1885) 10 App Cas 282, PC. Cf *Golden-Brown v Hunt* [1972-73] ALR 1377, Aust Cap Terr SC. The power to alter rates of taxation may be delegated: *Mootoo v A-G of Trinidad and Tobago* [1979] 1 WLR 1334, PC.

22 *Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick* [1892] AC 437 at 441, PC; *Nyali Ltd v A-G* [1956] 1 QB 1 at 33, [1955] 1 All ER 646 at 665, CA. See also *Commonwealth of Australia v State of New South Wales* [1929] AC 431 at 441, PC (the fact that rights in property may be founded on a conveyance by Order in Council does not confer on them an immunity from local legislation).

23 See *Nadan v R* [1926] AC 482, PC; cf *British Coal Corpn v R* [1935] AC 500 at 516, PC; *Woolworths (New Zealand) Ltd v Wynne* [1952] NZLR 496 at 520, NZ CA; Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966) pp 379-380, 454. See, however, PARA 830.

24 This is entailed by the terms of the Colonial Laws Validity Act 1865 s 5. See notes 2, 10, 12-14. Note that an attempt by a colonial legislature to abrogate its powers of altering its own constitution, powers or procedure would doubtless be repugnant to s 5 itself and would thus be void under s 2 (see PARA 829): *McCawley v R* (1918) 26 CLR 9 at 50, Aust HC, per Isaacs J and Rich J; and see also *McCawley v R* [1920] AC 691 at 701, PC; *A-G for New South Wales v Trethowan* (1931) 44 CLR 394 at 430-431, Aust HC per Dixon J, and at 436 per McTiernan J (affd [1932] AC 526, PC).

25 *Re Initiative and Referendum Act* [1919] AC 935, PC. Cf *Taylor v A-G of Queensland* (1917) 23 CLR 457, Aust HC; *Clayton v Heffron* (1960) 105 CLR 214, Aust HC, both cases holding that the Colonial Laws Validity Act 1865 s 5 authorises the legislature of a British overseas territory to convert itself from a bicameral to a unicameral legislature (the same may be true of the general power of legislating for the peace, order and good government of a territory; but cf note 1); and see *Doyle v A-G for New South Wales* (1933) 33 SR NSW 484, NSW FC (affd [1934] AC 511, PC). Quaere whether it could deprive itself of its representative character: see *Clayton v Heffron* (1960) 105 CLR 214 at 255, Aust HC, per Fullagar J. See also note 6.

26 Where a provision of the Constitution is amended by implication, the procedures required for express repeal or amendment of that provision must be followed: *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356, [2005] 2 LRC 840; *Ssemogerere v A-G* [2005] 1 LRC 50, Uganda SC.

27 *McCawley v R* [1920] AC 691, PC; *Kariapper v Wijesinha* [1968] AC 717 at 739-744, [1967] 3 All ER 485 at 493-495, PC.

28 Colonial Laws Validity Act 1865 s 3. See also *Li Hong Mi v A-G for Hong Kong* [1920] AC 735 at 737, PC.

29 See PARAS 868-869.

30 *Liyanage v R* [1967] 1 AC 259 at 284, [1966] 1 All ER 650 at 656, PC; *Phillips v Eyre* (1870) LR 6 QB 1 at 20-27, Ex Ch. Thus constitutional rights recognised by the common law and judicially enforced in the United Kingdom do not apply in the interpretation and application of the power to legislate for the peace, order and good government of a British overseas territory: *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769; and see note 19.

31 *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, [1979] 3 All ER 241, PC; *Akar v A-G of Sierra Leone* [1970] AC 853 at 870, [1969] 3 All ER 384 at 393, PC; *Western Transport Pty Ltd v Kropp* [1965] AC 914, [1964] 3 All ER 722, PC; *R v Kidman* (1915) 20 CLR 425, Aust HC; *Li Hong Mi v A-G* (1918) 13 HKLR 6, Hong Kong FC (revsd on other grounds sub nom *Li Hong Mi v A-G for Hong Kong* [1920] AC 735, PC); *Corbett Ltd v Floyd* [1958] EA 389, East Africa CA.

32 *Phillips v Eyre* (1870) LR 6 QB 1, Ex Ch; *Tilonko v A-G of Natal* [1907] AC 93, PC.

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827 Nature and extent of constituent and general legislative powers

NOTE 19--*Bancoult*, cited, reported at [2009] 1 AC 453.

828. Limitations on extra-territorial legislation.

There is a presumption that the legislation of the legislature of a British overseas territory is to be interpreted as having only local application[1]; this presumption is stronger than the ordinary presumption applicable to the enactments of the United Kingdom and other non-dependent legislatures[2]. Indeed, there can be said to be a rule that, in the absence of authority expressly conferred for that purpose, the legislatures of British overseas territories are incompetent to legislate with extra-territorial effect[3]. This rule is of somewhat obscure extent[4], and its existence has been doubted[5]; but the better view is that it exists[6], though within a narrow field of operation. The rule is not that the territorial limits of a legislature define the possible limits of its legislative enactments[7]; rather, the rule is that those enactments which purport to have an extra-territorial operation, application or effect will be valid only if they bear a substantial relationship to the peace, order and good government of the territory concerned, whether generally or in respect of particular subjects[8]. In particular, legislation creating any liability must base that liability on some fact, circumstance, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned[9].

In determining the validity of legislation in this respect, it is important to have regard to what is ordinarily embraced within the topic in legislative practice and particularly in the legislative practice of the state from which the power to legislate originated[10]. So, legislation in relation to deportation[11], the maintenance[12] and discipline[13] of defence forces, and the penalisation of hovering outside territorial waters for purposes of smuggling[14] may be validly enacted although extra-territorial in operation. Legal proceedings, penalties and charges against defendants and other persons not within the territory may be authorised in respect of causes of action and events arising and occurring within it[15]. Although the ambit of the taxing power of the legislature of a British overseas territory is not to be narrowly confined, there must be a sufficient territorial connection between the person taxed and the legislature imposing the tax; thus the power does not extend to the taxation of a person neither resident nor domiciled in the territory in respect of property not situated there; and statutes are to be interpreted accordingly[16].

1 *Macleod v A-G for New South Wales* [1891] AC 455, PC; *R v Lander* [1919] NZLR 305, NZ SC.

2 See *R v Foster, ex p Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 274, Aust HC, per Dixon CJ.

3 *Macleod v A-G for New South Wales* [1891] AC 455, PC; *Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737, Aust HC; *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association* (1913) 16 CLR 664, Aust HC; *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association (No 3)* (1920) 28 CLR 495, Aust HC. See also *R v Foster, ex p Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, Aust HC; *Tagaloa v Inspector of Police* [1927] NZLR 883 at 893, NZ SC; cf *R v Christian* [1924] App D 101, SA App Div. See also note 6.

4 See *British Coal Corpn v R* [1935] AC 500 at 520, PC; *Commonwealth v Queensland* (1975) 7 ALR 351, Aust HC; *Pearce v Florenca* (1976) 9 ALR 289, Aust HC; *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43, Aust HC.

5 *Wacando v Commonwealth of Australia* (1981) 37 ALR 317 at 326, 331-332, 337, Aust HC; *Croft v Dunphy* [1933] AC 156 at 163, PC (a case concerning the legislation of a fully self-governing Dominion); *R v Fineberg* [1968] NZLR 119, NZ SC (appeal dismissed on other grounds [1968] NZLR 443, NZ CA).

6 *British Columbia Electric Rly Co Ltd v R* [1946] AC 527 at 542, PC; *Nadan v R* [1926] AC 482, PC, as explained in *Woolworths (New Zealand) Ltd v Wynne* [1952] NZLR 496, NZ CA; *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1154, PC.

7 *Jersey Fishermen's Association v States of Guernsey* [2007] UKPC 30 at [33], [2008] 1 LRC 198 at [33], [2007] All ER (D) 39 (May), quoting the text to notes 7-9 from this paragraph in the previous edition of this title; see also *Wallace Bros & Co Ltd v Income Tax Comrs, Bombay* (1948) 75 LR Ind App 86 at 98, PC.

8 *Broken Hill South Ltd v Taxation Comr (New South Wales)* (1937) 56 CLR 337 at 375, Aust HC, per Dixon J; *Thompson v Stamp Duties Comr* [1969] 1 AC 320 at 335-336, [1968] 2 All ER 896 at 901, PC; *Trustees, Executors and Agency Co Ltd v Federal Taxation Comr* (1934) 49 CLR 220, Aust HC.

9 *Broken Hill South Ltd v Taxation Comr (New South Wales)* (1937) 56 CLR 337 at 375, Aust HC, per Dixon J.

10 *Croft v Dunphy* [1933] AC 156 at 165, PC.

11 *A-G for Canada v Cain* [1906] AC 542, PC; *Robtelmes v Brenan* (1906) 4 CLR 395, Aust HC; *Co-operative Committee on Japanese Canadians v A-G for Canada* [1947] AC 87, PC; *Zabrovsky v General Officer Commanding Palestine* [1947] AC 246, PC; *R v Secretary of State for Foreign Affairs and Secretary of State for the Colonies, ex p Greenberg* [1947] 2 All ER 550.

12 *Semple v O'Donovan* [1917] NZLR 273 (NZ SC); *Sickerdick v Ashton* (1918) 25 CLR 506, Aust HC.

13 The law of a British overseas territory may validly make provision in relation to any of Her Majesty's forces raised under that law, and to its members, so as to have effect when they are outside that territory (as well as when they are within it) and to apply in relation to them provisions (with or without modifications) of the Armed Forces Act 2006: s 357. Such an application cannot extend to members of such an overseas territory force while serving or training with United Kingdom regular or reserve military forces: s 369(1)(b).

14 *Croft v Dunphy* [1933] AC 156, PC.

15 *Ashbury v Ellis* [1893] AC 339, PC; *Boots Chemists (New Zealand) Ltd and Boots Pure Drug Co Ltd v Chemists' Service Guild of New Zealand Inc* [1968] AC 457 at 477-478, [1967] 3 All ER 234 at 238, PC. As to the limits of validity see eg *Welker v Hewett* (1969) 120 CLR 503, Aust HC; *Cox v Tomat* [1972] ALR 497, Aust HC. And see the type of territorial nexus held sufficient in *Peninsular and Oriental Steam Navigation Co v Kingston* [1903] AC 471, PC (a law penalising entry into territorial waters by a vessel which has broken cargo seals outside those waters, the seals having been placed in position previously in a port of the territory). As to control of seas outside territorial waters see *R v Bull* (1974) 3 ALR 171 at 192, 200, 218, 223-224, 231, Aust HC; *Robinson v Western Australian Museum* (1977) 16 ALR 623 at 634-636, 642-643, 664, 675, Aust HC; *Bonser v La Macchia* [1969] ALR 741 at 747, Aust HC, per Barwick CJ and at 772-774 per Windeyer J.

16 *Johnson v Stamp Duties Comr* [1956] AC 331, [1956] 1 All ER 502, PC (and the cases approved therein). See also *London and South American Investment Trust Ltd v British Tobacco Co (Australia) Ltd* [1927] 1 Ch 107; *Taxes Comr v Union Trustee Co of Australia Ltd* [1931] AC 258, PC; *Trinidad Lake Asphalt Operating Co Ltd v Trinidad and Tobago Income Tax Comrs* [1945] AC 1, [1945] 1 All ER 9, PC; *Wallace Bros & Co Ltd v Income Tax Comrs, Bombay* (1948) 75 LR Ind App 86, PC; *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694 at 706, 718, [1964] 3 All ER 692 at 695-696, 703, PC; *Thompson v Stamp Duties Comr* [1969] 1 AC 320, [1968] 2 All ER 896, PC.

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829. Limitation by repugnancy.

Any colonial[2] law[2] which is repugnant to[3] any Act of Parliament extending by express words or necessary intendment to the territory to which such law relates, or which is repugnant to any order or regulation made under the powers of, or having the force of, such an Act in the colony[4], is void to the extent of the repugnancy[5]. Hence the validity of colonial laws is subject to examination by the courts of the territory and the Judicial Committee of the Privy Council[6].

1 The term 'colony' does not here include the Channel Islands or the Isle of Man: Colonial Laws Validity Act 1865 s 1.

2 Ie including legislation by Her Majesty in Council: Colonial Laws Validity Act 1865 s 1. Hence one basis of the need for express provisions as to their revocability in Orders in Council made by statutory authority and extending to colonies.

3 The meaning of the term 'repugnant to' (and of like terms, such as 'inconsistent with') is not settled: see eg *A-G for Queensland (ex rel Goldsborough Mortgage Co Ltd) v A-G for the Commonwealth* (1915) 20 CLR 148, Aust HC; *Union Steamship Co of New Zealand v Commonwealth* (1925) 36 CLR 130, Aust HC; *Ffrost v Stevenson* (1937) 58 CLR 528, Aust HC.

4 See *Gilbertson v South Australia* [1978] AC 772 at 781-783, PC; *R v Secretary of State for Foreign Affairs, ex p Indian Association of Alberta* [1982] QB 892 at 912, [1982] 2 All ER 118 at 124, CA, per Lord Denning MR; cf at 934 and 140 per May LJ.

5 Colonial Laws Validity Act 1865 ss 1, 2.

6 *R v Marais, ex p Marais* [1902] AC 51, PC; and see *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, PC. See PARAS 812, 827, 831. See also *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769.

UPDATE

829 Limitation by repugnancy

NOTE 6--*Bancoult*, cited, reported at [2009] 1 AC 453.

830. Power to regulate jurisdiction of Privy Council.

Subject to the provisions of any Order in Council having effect under any Act of the United Kingdom Parliament[1], the legislature of a British overseas territory may make laws providing for[2], extending[3], diminishing[4] or otherwise regulating the exercise[5] of the right of appeal from tribunals of the territory to the Privy Council[6], though such a legislature cannot abrogate the right to apply to Her Majesty in Council for special leave to appeal to the Privy Council[7]. Such a dependent legislature may also create special quasi-judicial jurisdictions in respect of which Her Majesty's prerogative of justice will not apply, and appeal to the Privy Council will in such cases be excluded if a legislative intention so to exclude it sufficiently appears[8].

1 *Logan v R* [1996] AC 871, [1996] 4 All ER 190, [1996] 2 LRC 468, PC.

2 Thus in Bermuda provision for appeal as of right and at the discretion of the local courts has always been made by such local enactments, rather than by Order in Council.

3 *A-G for Ontario v A-G for Canada* [1912] AC 571, PC; *A-G for British Columbia v A-G for Canada* [1914] AC 153 at 162, PC. See also PARA 719 note 1.

4 See the unreported decision of the Judicial Committee, delivered in November 1837 on a special reference, upholding the validity of Act No 15 of 1836 of Bermuda; and see also *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *Cushing v Dupuy* (1880) 5 App Cas 409, PC; *A-G for Ontario v A-G for Canada* [1947] AC 127 at 148, [1947] 1 All ER 137 at 142-143, PC.

5 See *Tampion v Anderson* (1974) 3 ALR 414, PC.

6 *British Coal Corpn v R* [1935] AC 500 at 520-522, PC.

7 *Nadan v R* [1926] AC 482, PC; *British Coal Corpn v R* [1935] AC 500 at 520, PC; cf *De Morgan v Director-General of Social Welfare* [1998] AC 275, [1998] 2 LRC 41, PC (and see PARA 719); *Logan v R* [1996] AC 871, [1996] 4 All ER 190, [1996] 2 LRC 468, PC.

8 *Thomas v R* [1980] AC 125, [1979] 2 All ER 142, PC; *Moses v Parker, ex p Moses* [1896] AC 245, PC.

831. Judicial review of legislative proceedings.

The courts of the territory have jurisdiction to inquire into[1] the status and conduct of members of colonial and other dependent and subordinate legislatures to the extent necessary to determine the lawfulness of the legislative proceedings and the validity of their legislation[2]. The courts have (on a proper application to them) a discretion to interfere, either by declaration or injunction, with the conduct of persons involved in the legislative process where that conduct is unlawful[3], though not, it seems, where the conduct is or may be merely ultra vires (for repugnancy, for example) rather than in a strict sense unlawful[4] or in contravention of the Constitution[5]. The courts will be reluctant to grant such discretionary relief before the purported legislative process is complete, if there is available the alternative remedy of a declaration that the purported statute when made is void[6]; but this alternative is not always available, since not every prohibited form of conduct in the course of legislative proceedings renders the resulting instrument void[7]. Where the executive believes that provisions of a duly enacted statute are unconstitutional by reason of their content, it should secure their repeal or devise a procedure to seek the opinion of the court, rather than leave them unimplemented until action is brought against it by a private citizen seeking an order against the executive to implement them[8].

1 Note that the certificate of the clerk (or other proper officer) of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor, or of any Bill reserved for the signification of Her Majesty's pleasure by the Governor, is prima facie evidence that the document so certified is a true copy of that law or Bill, and that the law has been duly and properly passed and assented to, or that the Bill has been duly and properly passed and presented to the Governor: Colonial Laws Validity Act 1865 s 6.

2 *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1154-1157, PC; *Clayton v Heffron* (1960) 105 CLR 214 at 235, Aust HC, per Dixon CJ, and at 273 per Menzies J; *Cormack v Cope* (1974) 3 ALR 419 at 427-428, 433-434 per Barwick CJ, at 437-439 per Menzies J, at 439-440 per Gibbs J, at 445 per Stephen J and at 446 per Mason J, Aust HC; *Victoria v Commonwealth* (1975) 7 ALR 1 at 11, 46-48, 61-62, Aust HC; *Western Australia v Commonwealth* (1975) 7 ALR 159, Aust HC; cf *Clydesdale v Hughes* (1933) 51 CLR 518, Aust HC. See also *Constitutional Reference No 1 of 2003* [2004] 5 LRC 1, Nauru SC.

3 *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, PC; *A-G for New South Wales v Trethowan* [1932] AC 526, PC (where the Constitution Act 1902-29 (NSW) provided that a certain class of Bill 'shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors ... '); and see *Clayton v Heffron* (1960) 105 CLR 214 at 233-234, Aust HC, per Dixon CJ.

4 *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1160-1163, PC; contrast the explanation of *A-G for New South Wales v Trethowan* [1932] AC 526, PC, given in *Bribery Comr v Ranasinghe* [1965] AC 172 at 199, [1964] 2 All ER 785 at 793, PC.

5 *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196, PC.

6 *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196, PC; *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at 1156-1157, PC; *Hughes and Vale Property Ltd v Gair* (1954) 90 CLR 203 at 204, Aust HC, per Dixon CJ; *Clayton v Heffron* (1960) 105 CLR 214 at 235, Aust HC, per Dixon CJ; and see the cases cited in note 2. As to standing to sue for such a declaration see *Thorson v A-G of Canada (No 2)* (1974) 43 DLR (3d) 1, Can SC; *Cormack v Cope* (1974) 3 ALR 419, Aust HC.

7 Thus a colonial law passed with the concurrence of the Governor or assented to by him is not invalidated by any inconsistency of the law or of the circumstances of its enactment with Royal Instructions, unless the inconsistency is with the terms of the instrument authorising the Governor to concur in or assent to laws for the peace, order and good government of the colony: Colonial Laws Validity Act 1865 s 4; *Winfat Enterprise (Hong*

Kong) Co Ltd v A-G of Hong Kong [1985] AC 733 at 748, [1985] 3 All ER 17 at 23, PC; *Pong Wai Ting v A-G of Hong Kong* (1925) 20 HKLR 22, Hong Kong SC. See also PARA 817.

8 *Suratt v A-G of Trinidad and Tobago* [2007] UKPC 55 at [37], [2008] 1 AC 655 at [37], [2008] 4 LRC 502 at [37].

832. Construction of legislation.

The legislation of colonies and other territories where the English common law in whole or part prevails is governed by the same rules of construction as apply in England, and the decisions of English courts on similar English legislation are authorities for the interpretation of such legislation[1].

In particular cases, however, there may be local conditions which make it inappropriate to follow the general rule that the courts of an overseas territory should govern themselves by authoritative English interpretations of statutes identical to the enactments of the legislature of that territory[2].

Legislation of the United Kingdom must not unnecessarily be held to extend to the colonies, and thereby overrule or qualify or add to their own legislation on the same subject[3].

1 *Catterall v Sweetman* (1845) 1 Rob Eccl 304 at 318 per Dr Lushington, Consistory Ct; *Trimble v Hill* (1879) 5 App Cas 342 at 344, PC; *de Lasala v de Lasala* [1980] AC 546 at 557-558, [1979] 2 All ER 1146 at 1152-1153, PC; and see PARA 869 note 9.

2 *Nadarajan Chettiar v Walauwa Mahatmee* [1950] AC 481 at 492, PC; *de Lasala v de Lasala* [1980] AC 546, [1979] 2 All ER 1146, PC.

3 *New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349 at 357, PC; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196; and see PARA 871.

833. Date of operation and time for assent.

A law enacted by the legislature of a British overseas territory comes into operation immediately on receiving the Governor's assent, unless some other date is prescribed by the Constitution of the territory[1] or by the law itself, or unless it contains a suspending clause. The assent may, it appears, be given at any time; the validity of the assent and of the resulting legislation is not affected by the fact that the legislature has been dissolved between the passing of the Bill and the signification of assent[2].

1 Thus the Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule s 53 provides that no law comes into operation until it has been published in the Gazette, but its coming into operation may be postponed and it may be given retrospective effect.

2 *Simpson v A-G* [1955] NZLR 271 at 283, NZ CA. But a Governor who has withheld assent on presentation of the Bill cannot afterwards validly assent unless it is again presented for assent: *Gallant v R* [1949] 2 DLR 425, PEI SC.

834. Reservation for signification of Her Majesty's pleasure.

It is modern practice with regard to British overseas territories to provide that the Governor may reserve Bills for the signification of Her Majesty's pleasure, instead of himself assenting or refusing his assent to them[1]. Such provisions (and other less extensive stipulations) as to reservation may be made by the territory's Constitution[2]. Alternatively, reservation may be stipulated only in Royal Instructions[3] which are not the source of the Governor's power to assent to Bills, or by annexed provisions to be observed so far as practicable; non-compliance with these stipulations thus does not invalidate the enactment[4]. Any substantial alteration of the Constitution is usually reserved. The royal assent, if accorded, is given by Order in Council or through the Secretary of State[5].

1 One older common-form provision is to the effect that Bills must usually be reserved which concern divorce, any grant of land, money or other donation to the Governor, currency, treaty relations, differential duties, or control of the armed forces; so also must Bills of an unusual purport affecting the prerogative or the rights and property of Her Majesty's subjects not resident in the colony, or the trade and shipping of Her Majesty's dominions and overseas territories, Bills whereby persons of any racial or religious community are made liable to special disabilities or restrictions or granted advantages not extended to others, and Bills containing provisions to which Her Majesty's assent has once been refused or which she has disallowed: see Pitcairn Royal Instructions 1970 dated 30 September 1970 (SI 1970 III p 6725). Newer forms provide for much more limited classes of reservable bills: see note 2.

2 See eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 79(2) (bills appearing to the Governor to be inconsistent with an obligation of Her Majesty or Her Majesty's Government in the United Kingdom towards any other state or any international organisation, or likely to prejudice the royal prerogative, or to be repugnant to or inconsistent with the territory's Constitution); the Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule s 52(2) (bills the Governor considers repugnant to or inconsistent with the territory's Constitution).

3 As to Royal Instructions see PARA 817.

4 Colonial Laws Validity Act 1865 s 4; *Pong Wai Ting v A-G of Hong Kong* (1925) 20 HKLR 22, Hong Kong SC; and see also PARA 831 note 7. The application of the Colonial Laws Validity Act 1865 s 4 to an Annex to an Order in Council is not clear.

5 As to the Secretary of State see PARA 708 note 4.

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835. Disallowance by the Crown.

In most of the British overseas territories a law passed by the legislature may, even though assented to by the Governor, be disallowed by the Crown, by virtue of its prerogative, at any subsequent time. If this power is exercised, the law in question ceases to have operation from the date at which notification of such disallowance is published in the territory.

On the grant of a representative legislature the power of disallowance may be regarded as lapsed unless it is specifically reserved in the constituent instrument[1].

Non-disallowance of a law does not establish or affect its validity[2].

1 This principle is based on an analogy with the principle in *Campbell v Hall* (1774) 20 State Tr 239, 1 Cowp 204. See PARAS 807-808. For an example of provision for disallowance see the Virgin Islands Constitution Order 2007, SI 2007/1678, ss 80, 81(1).

2 *Nadan v R* [1926] AC 482 at 493, PC; *D'Emden v Pedder* (1904) 1 CLR 91 at 117-118, Aust HC.

(5) THE JUDICATURE IN BRITISH OVERSEAS TERRITORIES

(i) The Judges

836. Appointment, tenure and removal of judges.

In most British overseas territories the Constitution or some constitutional instrument makes express provision for the appointment, tenure of office and removal of judges of the Supreme Court (or any other specified superior court of record) and of the Court of Appeal[1].

In most British overseas territories it is now provided that a judge or acting judge of the superior court or courts having jurisdiction in the territory may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour[2]. Such a judge can only be removed by the Governor, who must remove him if, and only if, the question of his removal has been referred by Her Majesty, at the request of the Governor, to the Judicial Committee of the Privy Council[3] and the Judicial Committee has advised Her Majesty that the judge ought to be removed. Before requesting such a reference to the Judicial Committee the Governor must appoint a tribunal (consisting of a chairman and at least two other members selected by the Governor from among persons who hold or have held high judicial office) to inquire into the matter, report to the Governor on the facts and advise him whether he should request such a reference; the Governor must make the request if the tribunal so advises[4]. Where the question of removing a judge has been referred to such a tribunal, the Governor may suspend the judge from performing the functions of his office; suspension may be revoked by the Governor at any time and in any case ceases to have effect if the tribunal advises the Governor not to request a reference to the Judicial Committee, or if the Judicial Committee advises against removal[5]. The functions of the Governor in respect of the removal of a judge by this procedure are all to be performed in his discretion.

In territories in respect of which provisions of the sort mentioned above have not been enacted, judges hold office at Her Majesty's pleasure[6], as do in any case the judges, magistrates and other judicial officers of inferior courts in all territories.

1 The provisions described in this paragraph are, with minor variations, stipulated for in the constitutional instruments of all the British overseas territories except the Sovereign Base Areas of Akrotiri and Dhekelia, the British Indian Ocean Territory and British Antarctic Territory. See eg the Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule s 90.

2 Enacted provisions as to the termination of a judge's appointment provide an exclusive procedure for the suspension of a judge's activities, whether by termination or otherwise, and a judge cannot be suspended by others or in other ways: *Rees v Crane*[1994] 2 AC 173 at 187-188, [1994] 1 All ER 833 at 841, [1994] 1 LRC 57 at 65, PC.

3 Such a reference will be made under the Judicial Committee Act 1833 s 4.

4 Such a tribunal does not form part of the judicial branch of government and need not comply with all the constitutional duties of a court: *Meerabux v A-G of Belize*[2005] UKPC 12, [2005] 2 AC 513, [2005] 4 LRC 281.

5 See note 2.

6 *Terrell v Secretary of State for the Colonies*[1953] 2 QB 482, [1953] 2 All ER 490. As to tenure at pleasure see PARA 822.

UPDATE

836 Appointment, tenure and removal of judges

NOTE 3--The Judicial Committee is not bound by the tribunal's findings of fact: *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43 at [13], [2009] All ER (D) 195 (Nov) at [13]. Issues of fact that bear on fitness for office (as distinct from misconduct) should be determined according to the civil standard of proof; but a conclusion by the tribunal that the judge's conduct amounted to impropriety, or brought himself and his office into such disrepute that it would damage the image of the territory's administration of justice if he were to continue to serve as judge, and accordingly justified his removal for inability to perform the office's functions, is not a question of fact subject to a standard of proof but a matter for judicial assessment: at [16], [203]-[206], [222]. The tribunal's procedure is, or can properly be, inquisitorial rather than adversarial: at [18]. Judicial independence is so important that removal can only be justified where the judge's shortcomings are so serious as to destroy confidence in the judge's ability properly to perform the judicial function: at [31].

TEXT AND NOTE 6--Though the lower judiciary (such as magistrates appointed on one-year contracts) enjoy a lower level of security from dismissal than the higher judiciary, the constitutional importance of autonomous public and judicial service commissions with powers of discipline and removal is such that a broad interpretation should be given to provisions entrusting the "power to remove" public or judicial officers to such commissions; and the constitutional protection afforded by such provisions must prevail over the terms of contracts of such officers with the authorities in the local jurisdiction: *Fraser v Judicial and Legal Services Commission*[2008] UKPC 25, [2009] 2 LRC 26, at [14]-[18].

837. Responsibility for judicial acts.

No action lies against a judge of a superior court of a British overseas territory for any act done in his judicial capacity and not wholly without jurisdiction[1].

1 *Anderson v Gorrie* [1895] 1 QB 668, CA, applied in *Gazley v Lord Cooke of Thorndon* [2000] 3 LRC 50, NZ CA; *Calder v Halket* (1840) 3 Moo PCC 28; and see *Re McC (a minor)* [1985] AC 528, sub nom *McC v Mullan* [1984] 3 All ER 908, HL. Cf *Haggard v Pélicier Frères* [1892] AC 61, PC; *Houlden v Smith* (1850) 14 QB 841. But persons who had acted as judges of the Royal Court of St Lucia under commissions irregularly issued by the Governor were held liable in an action for acts done in their assumed judicial capacity: *Gahan v Lafitte* (1842) 3 Moo PCC 382.

(ii) Admiralty Jurisdiction

838. Admiralty jurisdiction.

Any court in a British possession[1] whose jurisdiction is unlimited in amount may be declared by a law[2] of the legislature of that possession to be a Colonial Court of Admiralty, with the same jurisdiction, in manner and extent, as the High Court in England; and, if no such declaration is in force there, every court having unlimited original jurisdiction is a Colonial Court of Admiralty[3]. Any inferior court of a British possession may, by the same authority, have partial or limited Admiralty jurisdiction conferred on it[4].

Her Majesty may empower a Secretary of State to establish in any British possession a Vice-Admiralty Court or Courts[5]. Any jurisdiction which may be exercised by a Colonial Court of Admiralty in that possession may be conferred on such a court, except that, in a British possession having a representative legislature[6], jurisdiction may be exercised only with respect to prize, Her Majesty's navy and matters dealt with by the Foreign Enlistment Act 1870[7] or in which questions relating to treaties or conventions or international law arise; a Secretary of State may appoint and dismiss the judges and other officers of any Vice-Admiralty Court[8].

Judgments in Colonial Courts of Admiralty are subject to appeal to local courts[9]. Appeal lies to the Queen in Council as of right, no leave of the local court being required[10] when the judgment is definitive; in other cases leave must be obtained locally or from the Privy Council[11]. The procedure in such cases is governed by special rules made locally and approved by the Queen in Council[12]. The same provisions apply to appeals from Vice-Admiralty Courts, although the rules may differ.

1 This does not include the Channel Islands: Colonial Courts of Admiralty Act 1890 s 11(1).

2 Such a law must, unless previously approved by Her Majesty, be reserved or contain a suspending clause (Colonial Courts of Admiralty Act 1890 s 4), except in the case of those British possessions which have become independent members of the Commonwealth: see the Statute of Westminster 1931 ss 6, 10; and similar provisions in subsequent enactments granting independence.

3 The jurisdiction conferred by virtue of the Colonial Courts of Admiralty Act 1890 is that which the High Court had in 1890 (*The Yuri Maru, The Woron*[1927] AC 906, PC), but not so as to extend to offences indictable according to the law of England. In relation to Her Majesty's navy, jurisdiction depends upon Order in Council; moreover the jurisdiction exercisable under statutes relating to prize (see, in particular, the Naval Prize Act 1864) is only that of a Vice-Admiralty Court: Colonial Courts of Admiralty Act 1890 s 2(3) proviso (amended by the Statute Law (Repeals) Act 1998). However, under the Supreme Court Act 1981 s 150, the jurisdiction of a Colonial Court of Admiralty in a colony or protectorate may (subject to the provisos and exceptions mentioned) be extended by Order in Council to cover the full Admiralty jurisdiction conferred on the High Court of England by s 20 (see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 85): see s 150(2). The Supreme Court Act 1981 is prospectively retitled the Senior Courts Act 1981 by the Constitutional Reform Act 2005 Sch 11 para 1, as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604, art 2(d). Orders making such extensions with modifications, exceptions and adaptations have been made in respect of the British Indian Ocean Territory and Gibraltar: see the Admiralty Jurisdiction (British Indian Ocean Territory) Order 1984, SI 1984/540; the Admiralty Jurisdiction (Gibraltar) Order 1987, SI 1987/1263. By virtue of the Interpretation Act 1978 s 17(2)(b), extensions of jurisdiction under the Administration of Justice Act 1956 ss 1, 2 (repealed) now have effect as if made under the Supreme Court Act 1981 s 150, in respect of the following territories: Cayman Islands (see the Admiralty Jurisdiction (Cayman Islands) Order 1964, SI 1964/922); Falkland Islands (see the Admiralty Jurisdiction (Falkland Islands) Order 1966, SI 1966/686); Montserrat (see the Admiralty Jurisdiction (Montserrat) Order 1968, SI 1968/1647); St Helena and its Dependencies (see the Admiralty Jurisdiction (St Helena and its Dependencies) Order 1969, SI 1969/858); Turks and Caicos Islands (see the Admiralty Jurisdiction (Turks and Caicos Islands) Order 1965, SI 1965/1529); Virgin Islands (see the

Admiralty Jurisdiction (Virgin Islands) Order in Council 1961, SI 1961/2033). Orders were also made in respect of certain territories which have since become independent.

4 Colonial Courts of Admiralty Act 1890 ss 2(1), (2), 3, 15. As to Colonial Courts of Admiralty see also **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 217.

5 Colonial Courts of Admiralty Act 1890 s 9(1); Defence (Transfer of Functions) Act 1964 ss 1(2), 3(2). As to the Secretary of State see PARA 708 note 4.

6 Ie one comprising a legislative body of which at least one-half are elected by inhabitants of the possession: Colonial Courts of Admiralty Act 1890 s 15. See further PARAS 705, 827 note 3.

7 See PARA 841; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 412.

8 Colonial Courts of Admiralty Act 1890 s 9(2) (amended by the Burma Independence Act 1947 Sch 2 Pt I; the Statute Law (Repeals) Act 1986; the Statute Law (Repeals) Act 1998; and by SR & O 1937/230); Defence (Transfer of Functions) Act 1964 ss 1(2), 3(2).

9 Colonial Courts of Admiralty Act 1890 s 5. See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 217.

10 *Richelieu and Ontario Navigation Co v Cape Breton (Owners)*[1907] AC 112, PC.

11 Colonial Courts of Admiralty Act 1890 s 6.

12 In approving rules, permission may be given for further variation without approval: Colonial Courts of Admiralty Act 1890 s 7(2).

839. Prize.

Her Majesty or a Secretary of State may at any time commission as a prize court in a British possession either a Vice-Admiralty Court, or a Colonial Court of Admiralty, or a Vice-Admiralty Court established ad hoc, but they may act only on a proclamation being issued by the Vice-Admiral of that possession that war has broken out between Her Majesty and a foreign state[1]. This power extends to the establishment of prize courts in places outside Her Majesty's dominions[2]. Colonial Courts of Admiralty within the meaning of the Colonial Courts of Admiralty Act 1890, and Vice-Admiralty Courts so commissioned, have been declared to be prize courts within the meaning of the Naval Prize Act 1864[3].

1 Prize Courts Act 1894 s 2; Defence (Transfer of Functions) Act 1964 ss 1(2), 3(2). See generally **PRIZE**.

2 Prize Act 1939 s 2.

3 Prize Act 1939 s 3.

840. Trial of Admiralty offences.

Any person charged within a colony with an offence committed at sea, or within the Admiralty jurisdiction[1], is to be dealt with in the same way as if the offence had been committed on waters within the local jurisdiction of the colony[2]. If a person dies in a colony of injuries received outside the colony, every offence in respect of the death is triable and punishable in the colony, as if wholly committed there; and if any person dies at sea, or elsewhere in the Admiralty jurisdiction, of injuries received anywhere, any offence arising therefrom is to be deemed to have been wholly committed at sea[3]. However, the punishment is to be only such as is prescribed for such an offence by the law of the colony, or, if it is not an offence by that law, such as most nearly corresponds to the punishment applicable by the law of England[4].

Colonial courts are empowered to deal with charges of offences alleged to have been committed on a foreign ship on the open sea but within the territorial waters of Her Majesty's dominions[5].

1 An offence committed on a British ship is within the criminal jurisdiction of the Admiralty and is therefore triable in those courts of criminal justice of the colony which exercise Admiralty jurisdiction: *Oteri v R* [1976] 1 WLR 1272, 11 ALR 142, PC.

2 Admiralty Offences (Colonial) Act 1849 s 1. However, a colonial legislature may make provisions corresponding to the Consular Relations Act 1968 s 5 (see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 303), whereby foreign nationals may not be tried by the courts of the colony for certain offences committed on board a ship of a specified state unless the criminal proceedings have been requested or consented to by a consular officer of that state: see s 15 (amended by the Merchant Shipping Act 1995 Sch 13 para 40(b)). See also note 3.

3 Admiralty Offences (Colonial) Act 1849 s 3 (amended by the Statute Law Revision Act 1891; and the Criminal Law Act 1967 Sch 2 para 6(a)). See also the Admiralty Offences (Colonial) Act 1860 s 1 (amended by the Criminal Law Act 1967 Sch 2 para 6(a)), which enables colonies to legislate for the trial of offences committed against persons who die at sea or abroad of injuries inflicted within the territory of the colony.

4 Courts (Colonial) Jurisdiction Act 1874 s 3. For various opinions as to the offences which may be dealt with under the Admiralty Offences (Colonial) Act 1849 s 1 (see the text and note 2) and the Courts (Colonial) Jurisdiction Act 1874 s 3 see *R v Bull* (1974) 3 ALR 171 at 189-190, 205, 217, 222, 231, Aust HC. Prior to the abolition of capital punishment for any offence in England (see the Human Rights Act 1998 Sch 1 Pt III (substituted by SI 2004/1574)), that punishment was not, however available under the Courts (Colonial) Jurisdiction Act 1874 s 3.

5 Territorial Waters Jurisdiction Act 1878 ss 2, 3. See also the Consular Relations Act 1968 ss 5, 15; and note 2.

(iii) Other Special Jurisdictions

841. Foreign enlistment offences.

Offences connected with illegal enlistment in the service of a foreign state which is at war with a friendly state[1], and illegal shipbuilding and expeditions, may be tried in any place in Her Majesty's dominions where the accused person happens to be[2].

1 A 'friendly state' is any foreign state at peace with Her Majesty: Foreign Enlistment Act 1870 s 4.

2 Foreign Enlistment Act 1870 s 16. See PARA 707; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 412.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/4. BRITISH OVERSEAS TERRITORIES/(5) THE JUDICATURE IN BRITISH OVERSEAS TERRITORIES/(iii) Other Special Jurisdictions/842. Colonial jurisdiction over United Kingdom armed forces.

842. Colonial jurisdiction over United Kingdom armed forces.

Jurisdiction has been withdrawn from the civil courts of most colonial territories in respect of offences against local law committed by members of United Kingdom forces (or of a civilian component of those forces) while on duty or, in respect of certain such offences, off duty; the courts nevertheless have jurisdiction if no objection to jurisdiction is made during the trial, or if the case is not going to be, and has not been, dealt with by a service court[1].

1 United Kingdom Forces (Jurisdiction of Colonial Courts) Order 1965, SI 1965/1203, arts 3(1), (2), 4; Order dated 31 July 1985 (SI 1985 II p 4488).

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/4. BRITISH OVERSEAS TERRITORIES/(5) THE JUDICATURE IN BRITISH OVERSEAS TERRITORIES/(iii) Other Special Jurisdictions/843. Ascertainment of local law.

843. Ascertainment of local law.

Any court within Her Majesty's dominions may remit a case to a superior court in another of those territories for an opinion on questions raised in that case relating to the law as administered in that other part, where different. The latter court is required to pronounce its opinion (if necessary after hearing the parties), which may then be lodged with the remitting court for application to the proceedings pending; and it may be adopted or rejected on appeal to Her Majesty in Council[1].

1 See the British Law Ascertainment Act 1859 ss 1-4; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 1092-1093. Such an appeal may also be made (1) at the date at which this volume states the law, to the House of Lords; (2) as from 1 October 2009, to the Supreme Court which is due to replace the appellate jurisdiction of the House of Lords as from that date: see the British Law Ascertainment Act 1859 s 4 (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 1(a), as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604, art 2(d)).

844. Evidence on commission.

In most overseas territories[1], the provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975[2] have been extended so as to confer on the Supreme Court in those territories power to order the obtaining of evidence, on an application made in pursuance of a request by or on behalf of a court exercising jurisdiction in a country or territory outside the territory, in proceedings or (in civil matters) contemplated proceedings before the requesting court, not being civil proceedings of a political character[3].

1 The provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975 have been extended to colonies in respect of which the Evidence by Commission Act 1859, the Foreign Tribunals Evidence Act 1856 and the Extradition Act 1870 s 24 have been repealed: Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 1, 10(3). Under those repealed provisions, the Supreme Court in certain colonies and any judge there appointed for that purpose by Order in Council could order the examination of any witnesses, within its or his jurisdiction, under a commission or other process from any competent court in Her Majesty's dominions, and could command the attendance of persons to be examined, the production of documents and so on: Evidence by Commission Act 1859 ss 1, 5 (repealed); and see generally *Bullivant v A-G for Victoria* [1901] AC 196, HL. Similar assistance could be given to foreign tribunals both in civil and commercial matters (Foreign Tribunals Evidence Act 1856 ss 1, 2, 6 (repealed)) and in criminal cases of a non-political character (Extradition Act 1870 ss 24, 25 (repealed).

The overseas territories in question are: Anguilla (see the Evidence (Proceedings in Other Jurisdictions) (Anguilla) Order 1986, SI 1986/218); Bermuda (see the Bermuda (Evidence) Order 1987, SI 1987/662); Cayman Islands (see the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978, SI 1978/1890); Falkland Islands and Dependencies (see the Evidence (Proceedings in Other Jurisdictions) (Falkland Islands and Dependencies) Order 1978, SI 1978/1891); Gibraltar (see the Evidence (Proceedings in Other Jurisdictions) (Gibraltar) Order 1978, SI 1978/1892); Sovereign Base Areas of Akrotiri and Dhekelia (see the Evidence (Proceedings in Other Jurisdictions) (Sovereign Base Areas of Akrotiri and Dhekelia) Order 1978, SI 1978/1920); Turks and Caicos Islands (see the Evidence (Proceedings in Other Jurisdictions) (Turks and Caicos Islands) Order 1987, SI 1987/1266).

2 As to the Evidence (Proceedings in Other Jurisdictions) Act 1975 see **CIVIL PROCEDURE** vol 11 (2009) PARA 1055 et seq.

3 See *Ukley v Ukley* [1977] VR 121, Vic FC.

845. Questions as to jurisdiction in a foreign country.

A court in Her Majesty's dominions or held under her authority may, in any proceedings, refer any question of the existence or extent of Her Majesty's jurisdiction in a foreign country to a Secretary of State, whose decision is final and whose answers are conclusive evidence of the matters in question[1]. Alternatively, other evidence of such jurisdiction is admissible and may, even in the absence of answers by the Secretary of State, satisfy the conditions of proof of such jurisdiction[2].

1 Foreign Jurisdiction Act 1890 s 4. See *Hervey v Fitzpatrick* (1854) Kay 421, decided under a similar provision in the Foreign Jurisdiction Act 1843 (repealed); *North Charterland Exploration Co (1910) Ltd v R* [1931] 1 Ch 169 at 184. As to the Secretary of State see PARA 708 note 4.

2 *Ibrahim v R* [1914] AC 599 at 606, PC.

846. Probate and insolvency.

Statutory provision is made for the resealing in the United Kingdom of probates and letters of administration granted by courts in certain British possessions[1].

A request, by a court in a British overseas territory having jurisdiction in insolvency, to a court in the United Kingdom having such jurisdiction is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law applicable by either court, having regard to the rules of private international law[2]. The courts exercising insolvency jurisdiction in the United Kingdom are to assist the courts having such jurisdiction in those territories[3].

1 See the Colonial Probates Act 1892 s 2 (amended by the Finance Act 1975 Sch 12 paras 2, 4, Sch 13 Pt I; the Supreme Court Act 1981 ss 152(1), 153(4), Sch 5; prospectively amended by the Constitutional Reform Act 2005 Sch 11 para 1(2), as from 1 October 2009, on which date the Supreme Court Act 1981 is to be retitled the Senior Courts Act 1981). See also the Colonial Probates (Protected States and Mandated Territories) Act 1927 s 1; the Colonial Probates Act Application Order 1965, SI 1965/1530; and **EXECUTORS AND ADMINISTRATORS**.

2 Insolvency Act 1986 s 426(5). See further **CONFLICT OF LAWS**.

3 Insolvency Act 1986 s 426(4). See the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123 (as to the territories of Anguilla, Bermuda, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, Turks and Caicos Islands and Virgin Islands).

847. Reciprocal enforcement of judgments.

Provision has been made by statute[1] for the enforcement in the United Kingdom of judgments of superior courts of prescribed parts of Her Majesty's dominions where reciprocal provisions apply. These provisions are considered elsewhere in this work[2].

1 See the Administration of Justice Act 1920, under s 14 of which many Orders in Council have been made extending the Act to parts of Her Majesty's dominions in which reciprocal provisions are in force. See also the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7; modified by the Administration of Justice Act 1956 s 51 (amended by the Civil Jurisdiction and Judgments Act 1982 Sch 14).

2 See **CONFLICT OF LAWS**.

848. Extradition.

For the purposes of extradition as between certain British overseas territories and the United Kingdom, Ireland, Commonwealth countries and other British overseas territories, the main provisions of the Extradition Act 1989[1], modified and adapted, extend to those territories[2], notwithstanding the Act's repeal for the purposes of English law[3].

Where an Order in Council is made applying provisions of the Extradition Act 1989 to a foreign state, the provisions of the Act are generally extended on an equal footing to every colony, subject to any limitations contained in the order and to modifications in that: (1) modifications as to procedure may be prescribed by the law of the colony; (2) references to the colony are substituted for references to the United Kingdom; (3) an extradition request may be made to the Governor and he may exercise the powers of the Secretary of State[4]; (4) extradition requests may be made by a consular representative recognised by the Governor; and (5) references to magistrates, courts or judges are construed as references to such judicial authority as the law of the colony provides[5].

A person in a listed British overseas territory[6] who is accused of an extradition crime in the United Kingdom, a designated Commonwealth country, a British overseas territory, or Ireland, or who is alleged to be unlawfully at large after conviction of such an offence in any such country or territory, may be arrested and returned to that country or territory in accordance with extradition procedures under Part III of the Extradition Act 1989[7]. The request for extradition may be made to the Governor by any person recognised by him as a diplomatic or consular representative of a foreign state[8] or an independent Commonwealth country, or by the Governor of any colony or of any dependency of the state on behalf of which the requisition is made[9].

It is the duty of courts in British possessions to ensure that the terms of extradition treaties, as made operative therein, are strictly observed, and to discharge from custody any person as to whom the law is not precisely followed, however unmeritorious his case may be[10].

1 Ie the Extradition Act 1989 ss 1, 2, 5-12, 14, 16-17, 19-21, 23-25, 27-28, 35-36: see **EXTRADITION**. The territories in relation to which these extend are those listed in the Extradition (Overseas Territories) Order 2002, SI 2002/1823, Sch 1, and include all British overseas territories except Gibraltar. However, the Extradition Act 1989 has effect in all British overseas territories: Extradition (Overseas Territories) Order 2002, SI 2002/1823, Sch 2 para 5(2).

2 Extradition (Overseas Territories) Order 2002, SI 2002/1823, art 2(1), made under the Extradition Act 1989 s 32. In its extension to the British Antarctic Territory and the British Indian Ocean Territory, the Extradition Act 1989, as modified and adapted, is subject to the further modifications and adaptations set out in the Extradition (Overseas Territories) Order 2002, SI 2002/1823, Schs 3, 4: art 2(2).

3 The repeal of the Extradition Act 1989 by the Extradition Act 2003 s 218(b), Sch 4 does not apply for the purposes of the Crown dependencies (the Bailiwicks of Jersey and Guernsey, and the Isle of Man), or any British overseas territory except Gibraltar, until provision has been made for (or by) the dependency or territory in question for replacing the 1989 Act's provisions: Extradition Act 2003 (Commencement and Savings) Order 2003, SI 2003/3103, art 5 (substituted by SI 2003/3258). Such provision may be made by an Order in Council made by the legislature of the dependency or overseas territory in question, for a dependency under Extradition Act 2003 s 222, or for an overseas territory under s 177 or s 178. As to the provision that has been made in relation to Jersey see the Extradition (Jersey) Law 2004 (Jersey).

4 As to the Secretary of State see PARA 708 note 4.

5 Extradition Act 1989 s 30 (repealed with savings: see note 3). Special arrangements may be made by Order in Council as to the application of the Extradition Act 1989 in colonies in relation to states with whom there are no general extradition arrangements: s 31 (repealed with savings).

6 See the Extradition (Overseas Territories) Order 2002, SI 2002/1823, Sch 2 para 1. All British overseas territories except Gibraltar are listed (see Sch 1; and note 1), but the Extradition Act 1989 has effect in all British overseas territories (see note 1). A person in a listed British overseas territory who is accused in the Hong Kong Special Administrative Region of an extradition crime, or is alleged to be unlawfully at large after conviction for such an offence in that Region, may be arrested and returned to that Region in accordance with extradition procedures under the Extradition Act 1989 Pt III (ss 7-17) (repealed with savings): Extradition (Overseas Territories) Order 2002, SI 2002/1823, Sch 2 para 1(2A) (added by SI 2002/1825).

7 See the Extradition (Designated Commonwealth Countries) Order 1991, SI 1991/1700, Sch 1 (amended by SI 1997/1761; SI 2003/1870; lapsed on the repeal of the enabling authority by the Extradition Act 2003 s 218(b), Sch 4; for saving provisions see SI 2003/3103; and note 3), omitting Cameroon, Malta, Mozambique, Namibia and Pakistan.

8 Ie a state which is not a member of the Commonwealth or a colony, and in relation to which an Order in Council was made under the Extradition Act 1989 s 4 (repealed) or under the Extradition Act 1870 s 2 (repealed) and has not been revoked.

9 Extradition Act 1989 ss 1, 2, 5(2), 7, 30(1)-(4), Sch 1 para 16 (repealed with savings: see note 3). See further **EXTRADITION**. As to the authority and powers of the Governor in relation to extradition under Orders in Council extending the Extradition Act 1870 to a colony as part of its law (such orders not being affected by the repeal of that Act: see the Extradition Act 1989 s 37(3) (repealed)) see the Extradition Act 1989 Sch 1 para 16(b) (repealed with savings), where applied by Order in Council.

10 *Kossekechatko v A-G for Trinidad* [1932] AC 78, PC. See generally **EXTRADITION**.

UPDATE

848 Extradition

TEXT AND NOTES 6-9--See *Deuss v A-G of Bermuda* [2009] UKPC 38, [2010] 1 All ER 1059.

849. Removal of prisoners from one British overseas territory to another.

Prisoners may be removed from one colony to another, for the purpose of serving their sentences, and returned on the expiry of their terms, under agreements between the responsible colonial authorities, sanctioned by Her Majesty in Council[1].

The Governor of a British possession may by warrant under his hand direct a prisoner to be removed to the part of Her Majesty's dominions ordered by the removing authority[2] and to be delivered into custody accordingly[3].

With the concurrence of the governments of the British possessions concerned, the Secretary of State may order a prisoner[4] to be removed from one British possession[5] to another, or to the United Kingdom[6], to serve out his term, for any of the following reasons: (1) that his life may be endangered, or his health permanently injured, by imprisonment where sentenced; (2) that he belonged to the Royal Air Force or to Her Majesty's regular military or naval forces when the offence was committed; (3) that the offence was committed wholly, or partly, outside the first British possession; (4) that there is no proper prison in the first British possession in which he can serve his sentence; (5) that he is a person who, by the law of the British possession, is subject to removal[7]. Provision is also made for: (a) the return of removed prisoners to complete their sentences, or to be discharged[8]; (b) evidence of the acts of the colonial governments and the Secretary of State to be given[9]; (c) warrants for the removal of prisoners[10]; (d) the custody of removed prisoners and appeals from conviction and sentence[11]; (e) dealing with escaped prisoners[12]; and (f) the cost of removal[13]. The Colonial Prisoners Removal Act 1884 is supplemented by regulations[14] which provide for the variation of sentences on removal and for the use of prescribed warrants and orders.

The Repatriation of Prisoners Act 1984 has been extended to most colonies, authorising the transfer of certain categories of consenting prisoner between a colony and another colony or country, pursuant to international arrangements[15].

1 Colonial Prisoners Removal Act 1869 s 4. See *Baker v Alford* [1960] AC 786, PC. Agreements have been sanctioned by Order in Council.

2 Ie the Secretary of State with the concurrence of the government of every British possession concerned: Colonial Prisoners Removal Act 1884 s 5. The concurrence may be given by the Governor in Council or other authority, and any writing purporting to give such concurrence and to be signed by the Governor or other appointed officer is conclusive evidence that the concurrence has been duly given: s 6. As to the Secretary of State see PARA 708 note 4.

The legislature of a British possession may make laws for determining the authority by whom and the manner in which jurisdiction under the Colonial Prisoners Removal Act 1884 is to be exercised, and as to the payment of costs, the mode of dealing with removed prisoners, the subjection of any class of prisoners to removal, and other necessary matters; and on the direction of Her Majesty in Council such laws may be given effect wholly or partly throughout Her Majesty's dominions and on the high seas as if they were part of the United Kingdom Act: s 12.

3 Colonial Prisoners Removal Act 1884 s 7(1). 'British possession' does not include any place within the United Kingdom, the Isle of Man or the Channel Islands, but includes all other places being parts of Her Majesty's dominions: s 18. The Colonial Prisoners Removal Act 1884 has been extended to places outside Her Majesty's dominions in which Her Majesty has jurisdiction. As to the power to extend the Act by Order in Council see s 15.

4 As to the application of the Colonial Prisoners Removal Act 1884 to 'criminal lunatics' as defined by s 18 see s 10 (amended by the Mental Health Act 1959 Sch 7 Pt I; the Mental Health Act 1983 Sch 4 para 3; the

Domestic Violence, Crime and Victims Act 2004 Sch 10 para 1; the Mental Health Act 2007 s 40(3)(c), Sch 11 Pt 8).

5 See note 3.

6 The Colonial Prisoners Removal Act 1884 extends to the Channel Islands and the Isle of Man as if they were part of England and the United Kingdom: s 14.

7 Colonial Prisoners Removal Act 1884 ss 2, 5 (amended by the Armed Forces Act 1981 Sch 3 Pt II para 4); Air Force (Application of Enactments) Order 1945, SR & O 1945/1275, art 1, Schedule. Agreements made under the Colonial Prisoners Removal Act 1869 (see the text and note 1) are not affected by the Colonial Prisoners Removal Act 1884: s 16(2) (amended by the Statute Law Revision Act 1963).

8 Colonial Prisoners Removal Act 1884 s 3; Air Force (Application of Enactments) Order 1945, SR & O 1945/1275.

9 Colonial Prisoners Removal Act 1884 s 6.

10 Colonial Prisoners Removal Act 1884 s 7.

11 Colonial Prisoners Removal Act 1884 s 8.

12 Colonial Prisoners Removal Act 1884 s 9.

13 Colonial Prisoners Removal Act 1884 s 11.

14 See the Colonial Prisoners Removal Order in Council 1907, SR & O 1907/742, made under the Colonial Prisoners Removal Act 1884 s 4. As to detention in Northern Ireland see the Colonial Prisoners Removal Order in Council 1913, SR & O 1913/484.

15 See the Repatriation of Prisoners Act 1984 ss 1-7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1411; **PRISONS** vol 36(2) (Reissue) PARA 555 et seq. See also the Repatriation of Prisoners (Overseas Territories) Order 1986, SI 1986/2226, art 2, Sch 2 (amended by SI 1987/1828). The colonies to which the Act is not extended are Bermuda, Turks and Caicos Islands, and the British Antarctic Territory.

(6) PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN BRITISH OVERSEAS TERRITORIES

850. General principles of protection of fundamental rights.

The Human Rights Act 1998 does not apply to British overseas territories as part of their law, even in those exceptional territories where the law of the territory is the law of England as in force from time to time[1]. But that Act, like other legal requirements governing public authorities in the United Kingdom, is capable of affecting acts (whether of Her Majesty in Council, the Secretary of State or other public authorities) intended to regulate the law or other aspects of the government of such a territory[2].

Constitutional provision has been made in most British overseas territories[3] for the protection of fundamental rights and freedoms[4]. In each case these provisions are prefaced by a declaration of entitlement, which can be considered in the main to be of the nature of a preamble and an explanation of the scheme of those provisions, but has the force of an enacting provision[5]. This declaration of entitlement does not confer any separate and independent rights; the rights and freedoms enforceable are those set out in the subsequent explicit provisions[6]. A common form[7] of this prefatory provision recites that every person[8] in the dependency is entitled to the fundamental rights and freedoms of the individual[9] (that is, the right, without distinction of any kind, such as race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, birth or other status, to each and all of certain rights and freedoms[10], but subject to respect for the rights and freedoms of others and for the public interest) and that the subsequent provisions are to have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations[11] on that protection as are contained in those provisions. The rights are summarily specified in the common prefatory provision to be: (1) life, liberty, security of the person, and the protection of the law; (2) freedom of conscience, of expression and of assembly and association; and (3) protection for the privacy of each person's home and other property and from deprivation of property without compensation[12].

Since the power of the territory's legislature is in all cases expressed to be a power to make laws subject to the provisions of the Constitution, the effect of the constitutional provisions for protection of fundamental rights and freedoms is in general to render invalid any purported enactments or other official instruments, acts or transactions which contravene those provisions[13]. But these provisions do not impose actionable duties on private individuals (or groups of individuals) as such[14]. In relation to Acts of the legislature, there is a presumption of constitutionality[15]; those parts of a Constitution which protect and entrench fundamental rights and freedoms are to be given a construction which, though generous and purposive, is not distorted[16], and the burden on a party seeking to prove invalidity is a heavy one[17].

1 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61 at [65], [2008] 4 All ER 1055 at [65], [2008] 3 WLR 955 at [65], [2008] 5 LRC 769 at [65]; *R (on the application of Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs*[2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 577. As to the question of the application of the Human Rights Act 1998 in relation to the Channel Islands see *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor*[2008] EWCA Civ 1319, [2009] 2 WLR 1205, [2008] All ER (D) 32 (Dec).

2 See PARA 812.

3 The Channel Islands and the Isle of Man have their own provisions, closely modelled on the Human Rights Act 1998, for giving direct effect to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): see PARAS 793, 795, 799; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 In drafting the human rights provisions discussed in the present paragraph, heavy reliance was placed on the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) which was extended to the dependent territories in question (among others) on 23 October 1953: *Reyes v R* [2002] UKPC 11 at [23], [2002] 2 AC 235 at [23], [2002] 2 LRC 606 at [23]. (More recent constitutional provisions in British overseas territories have been intended to parallel not only the 1950 Convention and the Human Rights Act 1998 but also the International Covenant on Civil and Political Rights.) It is appropriate to take into consideration in interpreting those provisions the interpretation accorded to corresponding provisions of the 1950 Convention by the European Court of Human Rights and other courts: *Ford v Labrador*[2003] UKPC 41 at [16], [2003] 1 WLR 2082 at [16], [2003] 5 LRC 549 at [16]; *Grant v R*[2006] UKPC 2, [2007] 1 AC 1, [2006] 3 LRC 621; and see *Minister of Home Affairs v Fisher*[1980] AC 319 at 328, [1979] 3 All ER 21 at 26, PC; see also *A-G v Antigua Times*[1976] AC 16 at 25, [1975] 3 All ER 81 at 84, PC; *Gleaves v Deakin*[1980] AC 477 at 482-484, [1979] 2 All ER 497 at 498-499, HL, per Lord Diplock. On the other hand, decisions of the United States Supreme Court on that country's Bill of Rights are of little help in construing provisions of modern Commonwealth Constitutions which follow the Westminster model: *Ong Ah Chuan v Public Prosecutor*[1981] AC 648 at 669, PC.

5 *Bishop of Roman Catholic Diocese of Port Louis v Tengur*[2004] UKPC 9, [2004] 3 LRC 316, [2004] All ER (D) 24 (Feb); *Société United Docks v Government of Mauritius*[1985] AC 585, [1985] 1 All ER 864, PC; *Francis v Chief of Police*[1973] AC 761, [1973] 2 All ER 251, PC; *Olivier v Buttigieg*[1967] 1 AC 115 at 128-129, [1966] 2 All ER 459 at 461, PC; and see also *Grape Bay v A-G* [2000] 1 WLR 574 at 580-582, [2000] 1 LRC 167 at 175-167, PC (from Bermuda); *Marsh v A-G* [1990] LRC (Const) 615, Bermuda SC.

6 *Campbell-Rodrigues v A-G of Jamaica*[2007] UKPC 65 at [12], [2008] 4 LRC 528 at [12], [2007] All ER (D) 28 (Dec).

7 For the common-form provision see eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 1.

8 Since in each case the Interpretation Act 1978 applies for the purpose of interpreting the constitutional instrument in which the provisions for protection of fundamental rights and freedoms are embodied, the expression 'person' in those provisions is to include, unless the contrary intention appears, any body of persons, corporate or unincorporate: ss 5, 25(2), Sch 1 sv 'person', Sch 2 para 4(1); *A-G v Antigua Times*[1976] AC 16, [1975] 3 All ER 81, PC. The test is, in each case, whether the right or freedom is, of its nature, capable of being enjoyed by a corporation or other body of persons: *A-G v Antigua Times*[1976] AC 16 at 27, [1975] 3 All ER 81 at 85, PC; *Shah Vershi Devshi & Co Ltd v Transport Licensing Board* [1971] EA 289 at 298, Kenya HC.

9 It appears that 'individual', like 'person', includes, where the context so permits, corporations and other bodies of persons: see *Shah Vershi Devshi & Co Ltd v Transport Licensing Board* [1971] EA 289 at 298, Kenya HC, relying on *Great Northern Rly Co v Great Central Rly Co* (1899) 10 Ry & Can Tr Cas 266 at 275.

10 See heads (1)-(3) in the text.

11 These limitations are said to be designed to ensure that the enjoyment of his constitutional rights by an individual does not prejudice the rights and freedoms of others or the public interest. Limitations (or authorisations of the imposition of limitations) on the protection afforded by constitutionally defined rights and freedoms are (whether derived from the terms of those definitions or from elsewhere in the Constitution) not to be interpreted expansively: see *A-G v Ryan*[1980] AC 718, PC. The rights of others, to which fundamental rights are subject and for the sake of which fundamental rights and freedoms may be limited, include the rights and privileges of a legislature and its members: *Syvret v Bailhache*[1999] 1 LRC 645 at 685, Jersey, Royal Court (Samedi Div).

12 See eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 1.

13 This is taken for granted in eg *Akar v A-G of Sierra Leone*[1970] AC 853, [1969] 3 All ER 384, PC. See also *Ulufa'alu v A-G*[2002] 4 LRC 1, Solomon Is HC. However, the protection afforded to the individual by such constitutional provisions for fundamental rights is available against any public authority endowed by law with coercive powers: *Maharaj v A-G of Trinidad and Tobago (No 2)*[1979] AC 385 at 396, PC; *A-G of Trinidad and Tobago v Whiteman*[1991] 2 AC 240, [1992] 2 All ER 924 at 927, PC. Historic common law doctrines restricting the liability of the Crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution: *Gairy v A-G of Grenada*[2001] UKPC 30, [2002] 1 AC 167, [2001] 4 LRC 671.

14 *Thornhill v A-G of Trinidad and Tobago*[1981] AC 61, PC; *Teitinnang v Ariong* [1987] LRC (Const) 517, Kiribati HC.

15 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 LRC 62, PC*; Mohammad v Ahmad* [1994] 1 WLR 697 at 704, PC; *A-G of the Gambia v Momodou Jobe*[1984] AC 689 at 702, PC. The presumption requires that, if it is possible to read the statutory language as subject to an implied term which avoids conflict with constitutional limitations, the court should be very ready to make such an implication: *Hector v A-G of Antigua and Barbuda*[1990] 2 AC 312 at 319, [1990] 2 All ER 103 at 107, PC; *Mootoo v A-G of Trinidad and Tobago* [1979] 1 WLR 1334 at 1338-1339, PC; *A-G v Antigua Times Ltd*[1976] AC 16 at 32, [1975] 3 All ER 81 at 90, PC. Similarly, or equivalently, the courts should, at least on many matters, leave the legislature a margin of appreciation: *Ming Pao Newspapers Ltd v A-G of Hong Kong* [1996] AC 907, PC; *La Compagnie Sucriere de Bel Ombre v Government of Mauritius* [1995] 3 LRC 494, PC. Although the cases in which this presumption has been held to exist concerned the legislatures of independent countries, it is submitted that it should in principle be equally applicable to the legislature of a dependent territory, since its power is plenary and indeed sovereign within its limits: see PARA 827 text and note 19.

16 *Campbell-Rodrigues v A-G of Jamaica*[2007] UKPC 65, [2008] 4 LRC 528, [2007] All ER (D) 28 (Dec); *Watson v R*[2004] UKPC 34, [2005] 1 AC 472, [2004] 4 LRC 811; *Boyce v R*[2004] UKPC 32, [2005] 1 AC 400, [2004] 4 LRC 749; *Matthew v State of Trinidad and Tobago*[2004] UKPC 33, [2005] 1 AC 433, [2004] 4 LRC 777; *Société United Docks v Government of Mauritius*[1985] AC 585, [1985] 1 All ER 864, PC; *A-G of The Gambia v Momodou Jobe*[1984] AC 689, PC. See also *Reyes v R*[2002] UKPC 11 at [26], [2002] 2 AC 235 at [26], [2002] 2 LRC 606 at [26]; *R v Hughes*[2002] UKPC 12 at [25], [2002] 2 AC 259 at [25]; *Ming Pao Newspapers Ltd v A-G of Hong Kong* [1996] AC 907, PC; *La Compagnie Sucriere de Bel Ombre v Government of Mauritius* [1995] 3 LRC 494, PC; *A-G of Trinidad and Tobago v Whiteman*[1991] 2 AC 240, [1992] 2 All ER 924, PC; *Vasquez v R*[1994] 3 All ER 674, [1994] 1 WLR 1304, PC. There is no principle or presumption that the specified rights were those already secured to the people of the territory, or that the only object of embodying them in the Constitution was to restrain future enactments which might derogate from them: *Gairy v A-G of Grenada*[2001] UKPC 30, [2002] 1 AC 167, [2001] 4 LRC 671. In adopting a non-rigid and generous approach to the rights designed to be protected, the courts will look at the substance and reality of what is involved and not be over-concerned with technicalities, whether to the benefit or disadvantage of the person seeking the court's protection: *Huntley v A-G for Jamaica* [1995] 2 AC 1 at 12, [1995] 1 All ER 308 at 315-316, PC; *Farrington v R*[1997] AC 395, 48 WIR 16, PC.

17 *Suratt v A-G of Trinidad and Tobago*[2007] UKPC 55 at [45], [2008] 1 AC 655 at [45], [2008] 3 LRC 502 at [45].

UPDATE

850 General principles of protection of fundamental rights

NOTE 1--*Bancoult*, cited, reported at [2009] 1 AC 453. *Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

851. Enforcement of protective provisions.

Where the Constitution of a British overseas territory makes provision for fundamental rights and freedoms, it also provides that if any person alleges that any of the rights and freedoms specifically protected has been, is being or is likely to be[1] contravened in relation to him[2], then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme (or High) Court for redress[3]. That court has original jurisdiction by virtue of the Constitution of each such territory[4] to hear and determine any application made by such a person and, unless satisfied that adequate means of redress are or have been available to that person under some other law[5], may make such orders, issue such writs and give such directions as it may consider appropriate[6] for the purpose of enforcing, or securing the enforcement of, any of those provisions to the protection of which the person concerned is entitled[7]. In most cases where breach of a constitutional right is established, the complainant is entitled not only to a declaration but also to damages; these are to be awarded not only to compensate (in those cases where the complainant has suffered loss) but also to reflect the sense of public outrage, emphasise the importance of the constitutional right that has been violated, and deter further breaches[8].

The Constitution normally confers, or empowers the making of laws to confer, on the Supreme (or High) Court further powers for enabling the court more effectively to exercise its jurisdiction to enforce the protective provisions, and for making rules of practice and procedure in relation to that jurisdiction[9]; the absence of such rules does not stultify the protective jurisdiction of the court[10].

1 In the absence of the phrase 'or is likely to be', an applicant would be required to show an actual, not merely a potential, infringement of his rights: *Malulake v Minister of Law and Order and A-G of Southern Rhodesia* [1963] R & N 554, 1963 (4) SA 206, Southern Rhodesia App Div.

2 The applicant must show by allegations of material fact in his pleadings that as a result of the legislative or executive acts complained of he has sustained, or is sustaining, or is immediately in danger of sustaining, a direct injury and that this injury is not one of a general nature common to all members of the public: *Steele v A-G* [1967-68] ALR Sierra Leone 1 at 13, Sierra Leone SC. But an injury or infringement of a person's right may be sufficiently directly related to him to entitle him to redress notwithstanding that the law or executive action in question is not addressed to him, and notwithstanding that the injury or infringement is not in itself substantial: *Olivier v Buttigieg* [1967] 1 AC 115 at 135-137, [1966] 2 All ER 459 at 466-467, PC. The onus of proof of standing rests on the applicant: see *Gordon v Minister of Finance* (1968) 12 WIR 416, St Lucia HC. But there can be redress even though remedies are available under the common law: *A-G of Antigua and Barbuda v Lake* [1999] 1 WLR 68, PC.

3 See eg the Virgin Islands Constitution, SI 2007/1678, s 31(1), which also provides that if the allegation relates to detention, a person other than the detained person may apply. The term 'apply to the Supreme Court for redress' is not a term of art, and is wide enough (unless and until other provision has been made specifically for the purpose of regulating application for redress under the constitutional protective provisions in question) to cover the use by an applicant of any form of procedure by which the Supreme Court can be approached to invoke the exercise of any of its powers including, inter alia, either the procedure appropriate to an ordinary civil action or an originating motion; provided only that the procedure adopted gives notice of the application to the person or authority against whom redress is sought, and affords him or it an opportunity of putting the case against such redress: *Jaundoo v A-G of Guyana* [1971] AC 972 at 982-983, PC. The liability correlative to the right of redress is a liability of the state itself or, at any rate, a liability in the public law of the state; for the provisions as to protection of fundamental rights are matters of public not private law and concern the acts of the state or of other public authorities endowed by law with coercive powers (eg a police officer: see *A-G of Trinidad and Tobago v Whiteman* [1991] 2 AC 240, [1992] 2 All ER 924, PC): *Thornhill v A-G of Trinidad and Tobago* [1981] AC 61, PC; *Alonzo v Development Finance Corpn* [1985] LRC (Const) 359, Belize CA. See further note 6.

4 See eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 18(2). The constitutional provisions themselves, even in the absence of any regulatory or supplementary legislation or rules of court, create both a jurisdiction in, and a right of access to, the court: *Jaundoo v A-G of Guyana* [1971] AC 972 at 982, PC. It is usually further provided that if in any proceedings in a subordinate court any question arises as to the contravention of the protective provisions, the court must refer the question to the Supreme (or High) Court unless, in its opinion, the raising of the question is merely frivolous or vexatious: see eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 18(3).

5 Correctly analysed, the authorities establish that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process that it will be dismissed by reference to the availability of some other remedy: *Independent Publishing v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190, [2005] 1 All ER 499, [2005] 1 LRC 222. But in general the availability of alternative relief such as an action for breach of contract or proceedings for judicial review will be fatal to an application for constitutional relief: *Johnatty v A-G for Trinidad of Tobago* [2008] UKPC 55, [2008] All ER (D) 165 (Dec), where the authorities are reviewed. Any claim that proceedings are an abuse of process must be made at the outset of the proceedings: *Naidike v A-G of Trinidad and Tobago* [2004] UKPC 49 at [57], [2005] 1 AC 538 at [57], [2005] 2 LRC 659 at [57].

Moreover, a claim for constitutional relief does not ordinarily offer an alternative means where a similar challenge, based on constitutional grounds, has been made and rejected, and the principle of res judicata is applicable to constitutional claims for relief: *Hinds v A-G of Barbados* [2001] UKPC 56, [2002] 1 AC 854, [2002] 4 LRC 287. Nor is a claim for constitutional relief appropriate or admissible in cases which depend for their decision on the resolution of disputes as to fact which are resolvable by using common law or other procedures existing independently of the Constitution: *Jaroo v A-G of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871, [2002] 5 LRC 258. It is an abuse of the process of the court to make application for redress under the constitutional provisions as a means of avoiding the necessity of applying for the appropriate judicial remedy for an unlawful administrative action which involves no contravention of a human right or fundamental freedom: *Durity v A-G of Trinidad and Tobago* [2002] UKPC 20, [2003] 1 AC 405, [2003] 1 LRC 210 (application brought under the constitutional provisions is an abuse of process if solely for the purpose of avoiding the need to apply for judicial review within the normal time limits); *Durity v A-G of Trinidad and Tobago* [2008] UKPC 59 (for dismissal or suspension from judicial office judicial review, not constitutional relief, is appropriate, but for delay in carrying forward proceedings for dismissal constitutional relief is appropriate, judicial review being too uncertain a remedy); *Harrikissoon v A-G of Trinidad and Tobago* [1980] AC 265, 31 WIR 348, PC; *Abbott v A-G of Trinidad and Tobago* [1979] 1 WLR 1342 at 1347, PC. It is similarly an abuse of process to make such an application where there is available and sufficient the alternative remedy of a judicial declaration that a purported statute or other law is invalid (a declaration which will be binding on the Parliament itself and on all persons attempting to enforce the purported law): *A-G of Trinidad v McLeod* [1984] 1 All ER 694, [1984] 1 WLR 522, PC. The constitutional guarantee of due process of law cannot confer a guarantee of correctness in decision or a right to resort to constitutional review as an alternative to pursuing the ordinary processes for appeal against conviction: *Forbes v A-G of Trinidad and Tobago* [2002] UKPC 21, [2003] 1 LRC 350, [2002] All ER (D) 264 (May).

6 The term 'redress' (see note 3) includes an order for payment of compensation, even where, apart from the Constitution's provision for application for redress, no action for damages or compensation would have lain against anyone: *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC 385, [1978] 2 All ER 670, PC; *Société United Docks v Government of Mauritius* [1985] AC 585, [1985] 1 All ER 864, PC. A claim for compensation may be made in conjunction with a claim for damages (eg for unlawful imprisonment), and the latter may include exemplary damages awarded on the ground of the unconstitutionality of the acts complained of: *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637 at 662, [1979] 3 All ER 129 at 142, PC; and see note 8.

7 If it is necessary to fashion a new remedy to give effective relief such as compensation by the government or the state, the court may do so within the broad limits of the constitutional provision for redress; historic common law doctrines restricting the liability of the Crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution; and it is not to be assumed (as it was by the Privy Council in certain cases in the 1960s and 1970s) that the rights specified in the Constitution were already secured to the people and that the object of embodying them in the Constitution was only to restrain future enactments: *Gairy v A-G of Grenada* [2001] UKPC 30, [2002] 1 AC 167, [2001] 4 LRC 671.

8 *Durity v A-G of Trinidad and Tobago* [2008] UKPC 59; *Subiah v A-G of Trinidad and Tobago* [2008] UKPC 47, [2008] All ER (D) 45 (Nov); *Inniss v A-G of St Christopher and Nevis* [2008] UKPC 42, [2009] 2 LRC 546, [2008] All ER (D) 59 (Aug) (as punishment in the strict sense is not its object, the expressions 'punitive', 'aggravated' or 'exemplary' damages are best avoided; the purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right, not to punish the executive; vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant himself has an interest); see also *Merson v Cartwright* [2005] UKPC 38, [2006] 3 LRC 264, [2005] All ER (D) 144 (Oct); *A-G of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, [2005] 4 LRC 301 (court may make additional award, not best described as punitive or exemplary, for breach of constitutional right in order to reflect sense of public outrage,

importance of right or gravity of breach). Such damages are called 'constitutional damages' in *Panday v Judicial and Legal Service Commission* [2008] UKPC 52 at [21], [2008] All ER (D) 73 (Dec).

9 See eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 18(5), (6).

10 *Jaundoo v A-G of Guyana* [1971] AC 972, 16 WIR 141, PC; and see notes 1-8.

UPDATE

851 Enforcement of protective provisions

NOTES 4, 6--On what persons or bodies pertain to the state, or are proper objects of an order for payment of compensation as constitutional redress: *A-G of Trinidad and Tobago v Smith* [2009] UKPC 50, unreported.

852. Derogations from fundamental rights during an emergency.

Where the Constitution of a British overseas territory makes provision for fundamental rights and freedoms, it also provides that nothing contained in or done under the authority of a law[1] is to be held to be inconsistent with specified[2] protective provisions, to the extent that the law in question authorises the taking, during any period of public emergency[3], of measures that are reasonably justifiable for dealing with the situation that exists in the territory[4]. It will generally be found that, where the Emergency Powers Order in Council 1939[5] no longer extends to a territory as part of its law, the legislature of that territory will have made further provisions as to the powers of the Governor and ministers during periods of proclaimed public emergency[6].

1 Where (as in eg the Turks and Caicos Islands) the Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) (see PARA 819) is still in force, the relevant constitutional provision (eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 17(1)) refers not to 'laws' but to regulations 'made under the Emergency Powers Orders in Council 1939 to 1973 or any other law in force in [the [territory] to like effect'.

2 The specified protective provisions which may thus be derogated from include, in each of the territories in question, the provision protecting the right to personal liberty and the provision protecting persons from discrimination on such grounds as race, place of origin, political opinions, colour or creed; in certain territories the list of provisions which may be derogated from is much longer: see eg the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 17(1).

3 In the Turks and Caicos Islands, 'period of public emergency' means a period during which Her Majesty is at war or there is in force in the territory a proclamation of emergency under the Emergency Powers Orders in Council 1939 to 1973 (see PARA 819). In certain other territories the Constitution makes specific provision for the making of a proclamation by the Governor declaring that a state of emergency exists for the purposes of that constitutional provision. See further note 6. Such a declaration will lapse after a specified period (in some territories, a week; and in some, two weeks or a longer period, depending on whether the legislature is sitting) unless during that period it has been approved by resolution in the legislature; provisions as to the passing, duration and extension of such resolutions vary from territory to territory. Any period during which Her Majesty is at war will be a period of public emergency, whether or not any proclamation of emergency is in force. See further *R v A-G and Green, ex p Grange and Brown* (1976) 23 WIR 139, Jamaica HC (a constitutional provision defining 'public emergency' as meaning a period during which there is in force a proclamation by the Governor General is sufficient to empower him to make such a proclamation).

4 A law which merely authorises the Governor to make such laws as he considers necessary or expedient is not a law which satisfies this constitutional requirement: *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, [1979] 3 All ER 129, PC; and see *Charles v Phillips and Sealey* (1967) 10 WIR 423, West Indies Associated States CA; *Herbert v Phillips and Sealey* (1967) 10 WIR 435, West Indies Associated States CA. Where a person is detained by virtue of or in pursuance of a law validly made in public emergency, the Constitution in each territory provides at least for review of his case by an independent and impartial tribunal established by law and presided over by a legally qualified person appointed by the Chief Justice; most of the Constitutions in question make more elaborate provision as to the rights of persons so detained: see eg the Virgin Islands Constitution Order 2007, SI 2007/1678, s 28. As to the specificity of the information concerning the grounds of his detention which is required to be given to a detainee see *Herbert v Phillips and Sealey* (1967) 10 WIR 435, West Indies Associated States CA.

5 Ie the Emergency Powers Orders in Council 1939: see PARA 819.

6 Where the Constitution does not expressly confer on the Governor a power to make such a proclamation of public emergency as is referred to in that Constitution, it will be found that such a power is conferred and defined by local legislation of the sort described (cf *Beckles v Dellamore* (1965) 9 WIR 299 at 305, Trinidad and Tobago CA), or by an Order in Council such as the Emergency Powers Order in Council 1939 (see PARA 819). Such local laws and such Orders in Council alike will be invalid if incapable of being construed so as to bring

them into conformity with the Constitution: *A-G of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, [1979] 3 All ER 129, PC.

(7) CONSTITUTIONS OF BRITISH OVERSEAS TERRITORIES

(i) Anguilla

853. Anguilla.

Anguilla was settled in 1650, and became administratively associated with St Christopher as from 1825. It was united with St Christopher and Nevis by an Act of the Leeward Islands Federation in 1883[1]. As such it was part of the West Indies Federation from 1958 to 1962, and of the associated state of St Christopher, Nevis and Anguilla from 1967. After being administered separately from the rest of that associated state as from April 1969, Anguilla ceased on 19 December 1980 to form part of its territory[2]. Her Majesty may by Order in Council make such provision as appears expedient for and in connection with the government of Anguilla, and may make provision: (1) for and in connection with the attainment by Anguilla of fully responsible status (within Her Majesty's dominions); (2) for and in connection with the establishment of Anguilla as an independent republic; or (3) after such provision as is mentioned in head (1) above has been made, in connection with Anguilla becoming a republic[3].

The Constitution of Anguilla[4] provides for protection of fundamental rights and freedoms. It also provides for a Governor (with reserved executive and legislative powers over external affairs, defence, international and related financial services, internal security including the police, and the public service), an Executive Council, a House of Assembly, a Public Service Commission and a Judicial Service Commission.

The jurisdiction of the Eastern Caribbean Supreme Court (High Court and Court of Appeal) is exercised in Anguilla in like manner as in Montserrat and the Virgin Islands[5]. Appeal lies to the Privy Council, either as of right or by special leave, in the usual classes of case[6].

1 St Christopher and Nevis Act 1882 (1882/1) (Leeward Islands) (spent).

2 Anguilla Act 1980 s 1(1) (repealed); Anguilla (Appointed Day) Order 1980, SI 1980/1953. See further the Anguilla (Consequential Provisions) Order 1981, SI 1981/603 (lapsed).

3 Anguilla Act 1980 s 1(2), (3).

4 Anguilla Constitution Order 1982, SI 1982/334, Schedule (amended by SI 1990/587; and by virtue of the British Overseas Territories Act 2002 s 2(3)). See also the Anguilla Royal Instructions 1982 dated 2 June 1982 (SI 1982 II p 4002); and the Anguilla (Public Seal) Order 1987, SI 1987/450.

5 Anguilla Consequential Provisions Order 1983, SI 1983/1107 (lapsed); Anguilla, Montserrat and Virgin Islands (Supreme Court) Order 1983, SI 1983/1108; Anguilla, Montserrat and Virgin Islands (Supreme Court) Order 2000, SI 2000/3060, extending the West Indies Associated States Supreme Court Order 1967, SI 1967/223. As to Montserrat see PARA 860; and as to the Virgin Islands see PARA 866.

6 Anguilla (Appeals to Privy Council) Order 1983, SI 1983/1109 (partially revoked by SI 2009/224). As to the usual classes of case in which appeal lies to the Privy Council see PARA 858. But note that the appealable amount in respect of Anguilla is £300: Anguilla (Appeals to Privy Council) Order 1983, SI 1983/1109, s 3 (partially revoked).

(ii) Bermuda

854. Bermuda.

Bermuda[1] is a colony acquired by settlement in 1612. It has had an elected Assembly since 1620[2], and the Crown has no general constituent or legislative power[3] of a prerogative nature. Hence the Constitution of 1968 is made by Order in Council[4] under the Bermuda Constitution Act 1967; it can be varied or revoked only by Order in Council under that Act or by further Act of Parliament[5].

The Constitution of Bermuda provides for protection of fundamental rights and freedoms. It also provides for a bicameral legislature (Senate and House of Assembly), a Cabinet on whose advice the Governor must act except in respect of matters which are his special responsibility (that is, external affairs, defence and the armed forces, internal security, and the police) or where he is empowered to act in his own discretion, and a Public Service Commission.

There is a Supreme Court[6], and a Court of Appeal[7]. Appeal lies to the Privy Council from the Court of Appeal[8] as of right from the final determination of any appeal. Appeal also lies to the Privy Council from any final determination of an application or question by the Supreme Court in proceedings for the enforcement of the provisions of the Constitution protecting fundamental rights and freedoms[9], and as of right or otherwise in the other usual classes of case[10].

1 Sometimes known as the Bermudas or Somers Islands: see the Bermuda Constitution Act 1967 s 1(5). As to the extension of the boundaries of Bermuda see the Bermuda (Territorial Sea) Order in Council 1988, SI 1988/1838.

2 Therefore Bermuda is not a British settlement for the purposes of the British Settlements Act 1887: see s 6; and PARA 807.

3 See PARA 807.

4 Bermuda Constitution Order 1968, SI 1968/182, Sch 2 (amended by SI 1968/463; SI 1968/726; SI 1973/233; SI 1979/452; SI 1979/1310; SI 1989/151; SI 2001/2579; SI 2003/456).

5 Bermuda Constitution Act 1967 s 1(3).

6 Bermuda Constitution Order 1968, SI 1968/182, Sch 2 s 73 (amended by SI 1979/1310).

7 Bermuda Constitution Order 1968, SI 1968/182, Sch 2 ss 77-79.

8 Appeals Act 1911 (Rev Laws 1989 title 8 item 86) (Bermuda) s 2. The prerogative appeal by special leave of the Privy Council is retained: s 27.

9 Ie proceedings under the Bermuda Constitution Order 1968, SI 1968/182, Sch 2 s 15.

10 As to the usual classes of case in which appeal lies to the Privy Council see PARA 858.

Halsbury's Laws of England/COMMONWEALTH (VOLUME 13 (2009) 5TH EDITION)/4. BRITISH OVERSEAS TERRITORIES/(7) CONSTITUTIONS OF BRITISH OVERSEAS TERRITORIES/(iii) British Antarctic Territory/855. British Antarctic Territory.

(iii) British Antarctic Territory

855. British Antarctic Territory.

The British Antarctic Territory is a colony constituted by Order in Council in 1962[1], and comprising all islands and territories between the 20th degree of west longitude and the 80th degree of west longitude which are situated south of the 60th parallel of south latitude[2]. It is constituted and governed under the British Settlements Acts 1887 and 1945[3].

The Commissioner for the Territory, appointed by Her Majesty[4], has plenary executive and legislative authority.

The Supreme Court of the Territory has the same composition and jurisdiction (and in practice the same personnel and location) as the Supreme Court of the Falkland Islands[5]. The same is true of the British Antarctic Territory Court of Appeal[6]. There are the usual provisions for appeal to the Privy Council[7].

1 British Antarctic Territory Order in Council 1962, SI 1962/400 (revoked).

2 British Antarctic Territory Order 1989, SI 1989/842, s 2. These islands and territories (namely the South Orkneys, the South Shetlands, Graham Land and the adjoining mainland) were until 1962 dependencies of the Falkland Islands: see the British Antarctic Territory Order in Council 1962, SI 1962/400, s 3 (revoked); and the revoked Letters Patent dated 21 July 1908 (SR & O Rev 1948 VII p 583) and 28 March 1917 (SR & O Rev 1948 VII p 585). See also PARA 863 note 1.

3 The creation of the new colony was effected by virtue of the Colonial Boundaries Act 1895.

4 British Antarctic Territory Order 1989, SI 1989/842, s 4.

5 The Falkland Islands Courts (Overseas Jurisdiction) Order 1989, SI 1989/2399, confers on the courts of the Falkland Islands jurisdiction in civil and criminal proceedings in respect of matters arising under the law of the British Antarctic Territory (see in particular s 3). As to the Falkland Islands see PARA 858. Jurisdiction may not be exercised by any court of the Territory over observers, or their staff, designated for the purpose of the Antarctic Treaty (Washington, 1 December 1959; TS 97 (1961); Cmnd 1535) art VII, or over scientists, or their staff, exchanged for the purpose of art III, where such observers, scientists or staff are nationals of any of the parties to the Treaty other than the United Kingdom: Antarctic Treaty Order in Council 1962, SI 1962/401, ss 2, 3; and see the Schedule containing the Treaty.

6 See the British Antarctic Territory Court of Appeal Order 1965, SI 1965/590.

7 See the British Antarctic Territory Court of Appeal (Appeal to Privy Council) Order 1965, SI 1965/592 (partially revoked by SI 2009/224). As to the usual classes of case in which appeal lies to the Privy Council see PARA 858. But note that the appealable amount in respect of the British Antarctic Territory is £500: British Antarctic Territory Court of Appeal (Appeal to Privy Council) Order 1965, SI 1965/592, s 3 (partially revoked)

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855 British Antarctic Territory

NOTE 5--SI 1989/2399 amended: SI 2009/1737.

(iv) British Indian Ocean Territory

856. British Indian Ocean Territory.

The British Indian Ocean Territory was created a separate colony in 1965[1], by removing the Chagos Archipelago from among the dependencies of Mauritius, and by removing the Farquhar Islands, the Aldabra Group and the Island of Desroches from the colony of Seychelles. These territories were acquired from the King of France by cession in 1814, and the Crown retains its constituent and legislative powers under the prerogative[2]. The Farquhar Islands, the Aldabra Group and the Island of Desroches were restored to Seychelles in 1976[3].

The Commissioner appointed by Her Majesty by instructions given through a Secretary of State[4] may legislate for the peace, order and good government of the territory[5]. He may create, appoint to, and dismiss from offices held at Her Majesty's pleasure[6].

There is a Supreme Court and a Court of Appeal, and appeal to the Privy Council in the usual classes of case[7].

1 British Indian Ocean Territory Order 1965, SI 1965/1920 (amended by SI 1968/111) (revoked), made partly under the Colonial Boundaries Act 1895 and partly under the prerogative.

2 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61, [2008] 4 All ER 1055, [2008] 3 WLR 955, [2008] 5 LRC 769, which further which further upholds the British Indian Ocean Territory (Constitution) Order 2004 s 9 (made and in force on 10 June 2004), which provides that, the territory having been constituted and set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in it or, accordingly, is entitled to enter or be present in it except as authorised by or under the Order or any other law in force for the time being in the territory. See also the British Indian Ocean Territory (Immigration) Order 2004 made and in force on 10 June 2004; as to the course of litigation regarding the removal of the native population of the Chagos Islands under earlier provisions, see also *Chagos Islanders v A-G*[2004] EWCA Civ 997, (2004) Times, 21 September, [2004] All ER (D) 85 (Aug). Her Majesty's powers to legislate and to amend or revoke the order are reserved by the British Indian Ocean Territory (Constitution) Order 2004 s 15. See also PARA 808.

3 British Indian Ocean Territory Order 1976 s 14 (revoked).

4 British Indian Ocean Territory (Constitution) Order 2004 s 4(1). The Commissioner has such powers and duties as Her Majesty may assign: s 5. He has the powers of a Governor for the purposes of the Emergency Powers Orders in Council 1939 to 1968 (see PARA 819): see the Emergency Powers (Amendment) Order 1968, SI 1968/724, s 2. As to the Secretary of State see PARA 708 note 4.

5 British Indian Ocean Territory (Constitution) Order 2004 s 10(1), (2). Any laws made by the Commissioner may be disallowed: s 11(1). See further the British Indian Ocean Territory Royal Instructions 1965 dated 8 November 1965 (SI 1965 III p 6440).

6 British Indian Ocean Territory (Constitution) Order 2004 s 7.

7 See the British Indian Ocean Territory (Appeals to Privy Council) Order 1983, SI 1983/1888 (partially revoked by SI 2009/224). As to the usual classes of case in which appeal lies to the Privy Council see PARA 858.

UPDATE

856 British Indian Ocean Territory

NOTE 2--*Bancoult*, cited, reported at [2009] 1 AC 453.

(v) Cayman Islands

857. Cayman Islands.

The colony of the Cayman Islands was acquired by settlement toward the end of the seventeenth century. In 1863 the United Kingdom Parliament brought the Islands within the jurisdiction of the Governor, legislature and Supreme Court of Jamaica[1]. As a dependency of Jamaica, the islands entered the Federation of the West Indies in 1957; from 1959 to 1962 they were a separate part of the federation. The 2009 Constitution is made by Order in Council[2] under the West Indies Act 1962, and a general power of legislating for the colony is reserved to Her Majesty in Council[3].

The 2009 Constitution provides for a greater degree of self-government than the 1972 Constitution which it is to replace. It includes, for the first time, a Bill of Rights setting out the fundamental rights and freedoms of the individual and provisions for their enforcement[4]. It provides for a Governor as Her Majesty's representative in the Islands[5], and for a Premier and other ministers who form a cabinet together with the Deputy Governor and the Attorney General[6]. Subject to the Constitution and to any other law, the Governor remains responsible for the conduct of any business of the government with respect to defence, external affairs[7], internal security, including the police[8], and the appointment of any person to any public office[9]; but he may, acting after consultation with the Premier, assign or delegate to any member of the cabinet, by instrument in writing and on such terms and conditions as he may impose, responsibility for the conduct on his behalf of any business in the Legislative Assembly with respect to any of these matters[10]. Provision is made for an elected Legislative Assembly, which together with Her Majesty forms the legislature[11].

There is a Grand Court and a Court of Appeal[12], and appeal to the Privy Council in the usual classes of case[13].

1 Cayman Islands Act 1863 ss 2, 6-8 (repealed). Hence the Cayman Islands is not a British settlement for the purposes of the British Settlements Act 1887: see s 6; and PARA 807.

2 Cayman Islands Constitution Order 2009, SI 2009/1379. The 2009 Constitution of the Cayman Islands is embodied in Sch 2 and is to come into force on such day as the Governor, acting in his discretion, appoints by proclamation published in a government notice (arts 1(2), 2(1), 4(1)), subject to the exceptions set out in art 4(2)-(5). In particular, Sch 2 Pt I (ss 1-28) (rights, freedoms and responsibilities) has effect from the day three years after the appointed day; but Sch 2 Pt I s 6(2), (3) (separation of convicted and unconvicted prisoners and treatment of juvenile prisoners) does not have effect until the day four years after the appointed day: see art 4(2). The 2009 Constitution replaces the Constitution embodied in the Cayman Islands (Constitution) Order 1972, SI 1972/1101, Sch 2 (amended by SI 1984/126; SI 1987/2199; SI 1992/226; SI 1993/3143; SI 2003/1515; SI 2004/2029; SI 2004/2673; SI 2008/3127) and revokes the Instructions issued under the Royal Sign Manual and Signet to the Governor of the Cayman Islands on 26 July 1972: see the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 1.

3 West Indies Act 1962 s 5(1); Cayman Islands (Constitution) Order 2009, SI 2009/1379, Sch 2 s 125. As to the constitutional history prior to the adoption of the 2009 Constitution see also *Al Sabah v Grupo Torras SA*[2005] UKPC 1, [2005] 2 AC 333, [2005] 1 All ER 871, [2005] 3 LRC 771.

4 Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 Pt I (ss 1-28); but as to the delayed implementation of the Bill of Rights see note 2.

5 Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 Pt II (ss 29-42). The Governor must exercise his functions in accordance with the Constitution and any other law and, subject thereto, in accordance with

such instructions (if any) as may be addressed to him by or on behalf of Her Majesty: Sch 2 s 31(2). Subject to Sch 2 s 32(2), the Governor must consult with the cabinet in the exercise of all functions conferred on him by the Constitution or any other law, in so far as it is reasonably practicable to do so and unless the matter is not materially significant such as to require consultation: Sch 2 s 32(1). He is not obliged to consult with the cabinet in the exercise of (1) any function conferred by the Constitution which the Governor is empowered to exercise in his discretion or judgment or in pursuance of instructions addressed to him by or on behalf of Her Majesty; (2) any function conferred by the Constitution or any other law which the Governor is empowered or directed, either expressly or by necessary implication, to exercise without consulting the cabinet or to exercise on the recommendation or advice of, or after consultation with, any person or authority other than the cabinet; or (3) the special responsibilities of the Governor set out in Sch 2 s 55 (see the text and notes 7-10), other than external affairs: Sch 2 s 32(2).

6 As to the executive see the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 Pt III (ss 43-58).

7 This is subject to the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 s 55(3), (4). The Governor must not enter, agree or give final approval to any international agreement, treaty or instrument that would affect internal policy or require implementation by legislation in the Cayman Islands without first obtaining the agreement of the cabinet, unless instructed otherwise by a Secretary of State: Sch 2 s 55(3). He must, acting after consultation with the Premier, assign or delegate to the Premier or another minister, by instrument in writing and on the terms and conditions set out in Sch 2 s 55(5), responsibility for the conduct of external affairs in so far as they relate to any matters falling within the portfolios of ministers, including (1) the Caribbean Community, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution; (2) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Cayman Islands; (3) tourism and tourism-related matters; (4) taxation and the regulation of finance and financial services; and (5) European Union matters directly affecting the Cayman Islands: Sch 2 s 55(4).

8 Ie without prejudice to the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 s 58 (the National Security Council).

9 See the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 s 55(1).

10 Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 s 55(2).

11 As to the legislature see the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 Pt IV (ss 59-93).

12 See the Cayman Islands Constitution Order 2009, SI 2009/1379, Sch 2 ss 94-103.

13 Cayman Islands (Appeal to Privy Council) Order 1984, SI 1984/1151 (partially revoked by SI 2009/224). As to the usual classes of case in which appeal lies to the Privy Council see PARA 858. But note that the appealable amount in respect of the Cayman Islands is £300: Cayman Islands (Appeal to Privy Council) Order 1984, SI 1984/1151, s 3 (partially revoked).

UPDATE

857 Cayman Islands

TEXT AND NOTES 2-11--2009 Constitution came into force on 6 November 2009.

NOTE 13--SI 1948/1151 further amended: SI 2009/3206.

(vi) Falkland Islands

858. Falkland Islands.

The colony of the Falkland Islands was acquired by settlement in the second half of the eighteenth century. It is a British settlement under the British Settlements Act 1887 and 1945 and the Crown therefore retains a general constituent and legislative power[1]. The Constitution, which provides for fundamental rights and freedoms of the individual, establishes also the office of Governor[2], a Legislative Assembly of eight elected and two ex officio members, and an Executive Council composed of three of the elected members of the Assembly and two ex officio members. The Constitution provides also for finance, the public service[3] and a Complaints Commissioner.

There is a Supreme Court and a Court of Appeal[4]. From the Court of Appeal appeal lies to the Privy Council in the usual classes of case, that is: (1) as of right from any final judgment, where the matter in dispute on the appeal amounts to or is of the value of £5,000 or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of that value or upwards[5]; or (2) at the discretion of the Court of Appeal, from any other judgment, whether final or interim, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great or general importance or otherwise ought to be submitted to Her Majesty in Council for decision[6]; or (3) by special leave of Her Majesty, granted on the petition of any person aggrieved by any judgment of the court[7].

1 See the British Settlements Act 1887 ss 2, 6. By 1853 the colony had a legislature constituted by virtue of 6 & 7 Vict c 13 (Settlements on Coast of Africa and Falkland Islands) (1843) (repealed by the British Settlements Act 1887). See PARA 807. The British Settlements Acts are the basis for the Constitution of the Falkland Islands and other constitutional provisions: Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule, effective on 1 January 2009.

2 The Governor must consult with the Commander British Forces before exercising any function relating to defence or internal security (with the exception of the police), and must act on the Commander's advice: Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule s 25.

3 In lieu of a Public Service Commission, there is a management code issued by the Governor with the approval of the Secretary of State: Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule s 85.

4 Falkland Islands Constitution Order 2008, SI 2008/2846, Schedule ss 86-87. As to Admiralty jurisdiction see PARA 838. The Court of Appeal need not sit in the Falkland Islands: Schedule s 92(3). In practice it has sat in London. No court of the colony has jurisdiction over non-British observers and scientists exchanged under the Antarctic Treaty (Washington, 1 December 1959; TS 97 (1961); Cmnd 1535): Antarctic Treaty (Immunity from Jurisdiction) Ordinance 1962 (1962/11) (Falkland Islands); and see PARA 855 note 5.

5 Falkland Islands (Appeals to Privy Council) Order 1985, SI 1985/445, s 3(a) (partially revoked by SI 2009/224). Leave to appeal is necessary: see *Lopes v Valliappa Chettiar* [1968] AC 887, [1968] 2 All ER 136, PC.

6 Falkland Islands (Appeals to Privy Council) Order 1985, SI 1985/445, s 3(b) (partially revoked by SI 2009/224).

7 Falkland Islands (Appeals to Privy Council) Order 1985, SI 1985/445, s 22 (partially revoked by SI 2009/224). Her Majesty may in admitting such an appeal impose such conditions as Her Majesty in Council thinks fit: s 22.

UPDATE

858 Falkland Islands

TEXT AND NOTES 5-7--SI 1985/445 further amended: SI 2009/3205.

(vii) Gibraltar

859. Gibraltar.

The City of Gibraltar[1] is a colony acquired by cession by the King of Spain to the Crown in 1713[2]. The Crown retains constituent and plenary legislative powers of a prerogative nature[3]. The Constitution provides for protection of fundamental rights and freedoms, and for the Governor (who remains responsible for external affairs, defence, internal security including the police, and certain functions in relation to appointments to public offices and related matters), the Gibraltar Parliament, the Council of Ministers, and public service commissions. It further provides for a Supreme Court, a Court of Appeal, and appeals to the Privy Council[4].

Gibraltar is within the European Community[5] but is excluded, under the United Kingdom's Act of Accession to the Community, from certain areas of Community policy. In particular, Gibraltar does not form part of the customs territory of the Community, with the result that the provisions on free movement of goods do not apply; it is treated as a third country for the purposes of the common commercial policy; it is excluded from the common market in agriculture and trade in agricultural products and from the Community rules on value added tax (VAT) and other turnover taxes; and it makes no contribution to the Community budget[6]. Gibraltarians have rights of free movement within the European Union. While the United Kingdom government is ultimately responsible for the implementation of Community law in Gibraltar, Community measures are usually implemented within the territory by means of local legislation enacted by the Gibraltar legislature. The European Court of Human Rights has held that the United Kingdom is responsible for securing for the citizens of Gibraltar the right to free elections to the European Parliament, as that body forms part of Gibraltar's legislature[7]. Accordingly, for the purposes of elections to the European Parliament, Gibraltar is included in a combined electoral region of the United Kingdom and Gibraltar, the South West region[8].

1 The Gibraltar Constitution Order 2006 dated 14 December 2006 (SI 2006 III p 11503) (in force 28 December 2006) s 2(a) refers to 'Gibraltar, a part of Her Majesty's dominions, known as the City of Gibraltar'. The Constitution is Annex 1 to this Order in Council.

2 See the Treaty of Utrecht 1713 (British and Foreign State Papers vol I pt 1 p 613).

3 These prerogative powers are reserved by the Gibraltar Constitution Order 2006 dated 14 December 2006 (SI 2006 III p 11503) Annex 2 s 8. The preamble to the Order declares that Gibraltar will remain part of Her Majesty's dominions until an Act of Parliament otherwise provides, and that Her Majesty's government will never enter arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.

4 Gibraltar Constitution Order 2006 dated 14 December 2006 (SI 2006 III p 11503) Annex 1 ss 60, 61, 66; Gibraltar (Appeals to Privy Council) Order 1985, SI 1985/1199 (partially revoked by SI 2009/224). Any right of Her Majesty to grant special leave to appeal to the Privy Council from the decision of any court in any civil or criminal matter is preserved by the Constitution of Gibraltar s 66(5).

5 See the EC Treaty art 299(4). The EC Treaty is cited in this title in the 2006 consolidated version (OJ C321E, 29.12.2006).

6 See the Act of Accession (1972) (TS 16 (1979); Cmnd 5179, 7461) art 28; and Application 24833/94 *Matthews v United Kingdom* (1999) 28 EHRR 361 (para 12), ECtHR.

7 Application 24833/94 *Matthews v United Kingdom* (1999) 28 EHRR 361, ECtHR.

8 European Parliament (Representation) Act 2003 s 9; European Parliamentary Elections Act 2002 Sch 1 para 1, Table (amended by the European Parliament (Representation) Act 2003 s 8(1), (3); and by SI 2004/366). See further the European Parliament (Representation) Act 2003 ss 10-13 (amended by the Communications Act 2003 Sch 19(1); the Electoral Administration Act 2006 Sch 1 Pt 7 para 156; and by SI 2003/1887). For these purposes, 'combined region' means the electoral region which includes Gibraltar; and 'electoral region' means an electoral region of the United Kingdom established under the European Parliamentary Elections Act 2002 for the purposes of European parliamentary elections: European Parliament (Representation) Act 2003 s 27(1). See also the European Parliamentary Elections (Combined Region and Campaign Expenditure) (United Kingdom and Gibraltar) Order 2004, SI 2004/366; the European Parliamentary Elections (Loans and Related Transactions and Miscellaneous Provisions) (United Kingdom and Gibraltar) Order 2009, SI 2009/185. As to electoral registration and voting in Gibraltar see the European Parliament (Representation) Act 2003 ss 14-18 (amended by SI 2003/1887); and the European Parliamentary Elections Regulations 2004, SI 2004/293; the European Parliamentary Elections (Amendment) Regulations 2009, SI 2009/186. The provisions of the European Parliamentary Elections Act 2002, other than Schs 3, 4, extend to Gibraltar: European Parliament (Representation) Act 2003 s 19. As to the jurisdiction of the courts with regard to election petitions relating to the combined region see s 23.

The terms of the European Parliament (Representation) Act 2003, which apply to the European Parliament elections in Gibraltar the rules governing the franchise (as to which see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 115) and eligibility to stand as a candidate for election (as to which see **ELECTIONS AND REFERENDUMS** vol 15(3) (2007 Reissue) PARA 235) laid down both for national elections in the United Kingdom and for elections to the Gibraltar House of Assembly, are not contrary to Community law: Case C-145/04 *Spain v United Kingdom* [2007] All ER (EC) 486, [2007] 1 CMLR 87, ECJ (definition of persons entitled to vote and to stand as a candidate in elections to the European Parliament fell within the competence of each member state in compliance with Community law; qualifying Commonwealth citizens resident in Gibraltar who were not Community nationals had the right to vote and to stand as candidates in elections). See also the European Parliament (Disqualification) (United Kingdom and Gibraltar) Order 2009, SI 2009/190, art 3 (certain persons, including those who hold specified offices in Gibraltar, disqualified for the office of member of the European Parliament).

The capacity (apart from the European Parliament (Representation) Act 2003) of the Gibraltar legislature to make law for Gibraltar is not affected by the existence of a power under Pt 2 (ss 9-24) or under the European Parliamentary Elections Act 2002 to make subordinate legislation extending to Gibraltar: European Parliament (Representation) Act 2003 s 24(1). Section 24(1) does not affect the operation of the Colonial Laws Validity Act 1865 in relation to subordinate legislation made under such a power: European Parliament (Representation) Act 2003 s 24(2).

UPDATE

859 Gibraltar

NOTE 4--SI 1985/1199 further amended: SI 2009/3207.

(viii) Montserrat

860. Montserrat.

The colony of Montserrat was acquired by settlement[1] in the mid-seventeenth century. Since the latter part of that century the Island has had a legislative assembly[2], whether of its own or jointly with others of the Leeward Islands and Barbados. In 1871 it was brought within the federated colony of the Leeward Islands, as one of the six presidencies[3]. In 1956 it was constituted as a separate colony, and as such joined the Federation of the West Indies in 1957. Under the West Indies Act 1962, which provided for the dissolution of that federation, Her Majesty has a general constituent power to provide by Order in Council for the government of the colony[4].

The Constitution of Montserrat[5] provides for fundamental rights and freedoms. It also provides for the Governor[6], an Executive Council with a Chief Minister and other elected and official members, and a mainly elected Legislative Council.

The Eastern Caribbean Supreme Court, consisting of a High Court and a Court of Appeal, exercises, in relation to Montserrat, the jurisdiction and powers conferred by the laws of Montserrat[7]. Appeal lies to the Privy Council from the Court of Appeal, as of right where the amount in dispute is of £300 or more, or in proceedings for dissolution or nullity of marriage, or where otherwise prescribed by law; with leave of the Court of Appeal in civil proceedings where the court considers that the matter, by reason of its importance or otherwise, ought to be submitted to the Privy Council; and by leave of the court in any other cases prescribed by law[8].

1 As to acquisition by settlement see PARA 802.

2 Hence the Crown has no general constituent or legislative power under the prerogative: see PARA 807.

3 The Leeward Islands Act 1871 s 7 (repealed) provided for a representative General Legislative Council of the Leeward Islands. Hence Montserrat is not a British settlement for the purposes of the British Settlements Act 1887: see s 6; and PARA 807.

4 West Indies Act 1962 s 5(1), (2), (4)-(6). See also ss 4(1)-(4), 7.

5 See the Montserrat Constitution Order 1989, SI 1989/2401, Sch 2 (effective from 13 February 1990; amended by SI 2000/1339).

6 The Governor has special responsibility for defence, external affairs, international financial services or any directly related aspect of finance, internal security (including the police force), and many specified matters relating to the public service, its organisation and its personnel: Montserrat Constitution Order 1989, SI 1989/2401, Sch 2 s 16(1).

7 West Indies Associated States Supreme Court Order 1967, SI 1967/223, s 10 (amended by SI 2000/3060; and by virtue of SI 1983/1108).

8 Montserrat (Appeals to Privy Council) Order 1967, SI 1967/233, ss 2, 3 (partially revoked by SI 2009/224; the Montserrat (Appeals to Privy Council) Order 1967, SI 1967/233, s 2 amended by SI 1983/1108).

(ix) Pitcairn, Henderson, Ducie and Oeno

861. Pitcairn, Henderson, Ducie and Oeno.

The colony of the Pitcairn, Henderson, Ducie and Oeno islands was acquired by settlement in the first half of the nineteenth century, and is regarded as a British settlement for the purposes of the British Settlements Acts 1887 and 1945[1], under which the present Constitution[2] is made.

The Governor has plenary powers of legislation[3], subject to disallowance[4], and has by ordinance constituted a Supreme Court[5]. A Pitcairn Court of Appeal and appeals from it to the Privy Council are provided for by Order in Council[6].

1 See the British Settlements Act 1887 s 6; and *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426, NZ CA (citing this paragraph in an earlier edition of this title). As to the history of British jurisdiction in this colony, its status as acquired by settlement and practice, and the applicability to it of the British Settlements Acts and English law more generally see *Christian v R*[2006] UKPC 47, [2007] 2 AC 400, [2007] 1 LRC 726; *R v Christian (No 2)* [2006] PNCA 1, [2006] 4 LRC 746, reversing in part [2006] 1 LRC 745, Pitcairn SC); *Christian v R*[2004] 5 LRC 706, Pitcairn CA (citing and following PARAS 801, 826 from the previous edition of this title).

2 See the Pitcairn Order 1970, SI 1970/1434.

3 Pitcairn Order 1970, SI 1970/1434, s 5 (amended by SI 2000/1340; SI 2002/2638). Although the Pitcairn Order 1970, SI 1970/1434, s 5 requires the Governor to publish any laws he makes (see s 5(3)), his general application of the laws of England to Pitcairn does not require him to publish all of those laws: *Christian v R*[2006] UKPC 47 at [16]-[17], [2007] 2 AC 400 at [16]-[17], [2007] 1 LRC 726 at [16]-[17]. By the Pitcairn Royal Instructions 1970 dated 30 September 1970 (SI 1970 III p 6725) cl 5, the Governor is directed to reserve certain classes of proposed laws. In practice the British High Commissioner in New Zealand is appointed Governor of Pitcairn. The Local Government Ordinance 1964 (1964/1; 1967/1) (Pitcairn) makes provision for an Island Council with wide powers to make regulations, alterable or revocable by the Governor.

4 Pitcairn Order 1970, SI 1970/1434, s 6.

5 Judicature (Courts) Ordinance 1999 (Pitcairn) (Rev Laws 2001 c 2) (Pitcairn) ss 3, 6.

6 Pitcairn Court of Appeal Order 2000, SI 2000/1341 (see also the Pitcairn Court of Appeal (Amendment) Order 2004, SI 2004/2669); Pitcairn (Appeals to Privy Council) Order 2000, SI 2000/1816 (partially revoked by SI 2009/224).

UPDATE

861 Pitcairn, Henderson, Ducie and Oeno

TEXT AND NOTES--The Constitution of Pitcairn, which applies to Pitcairn, Henderson, Ducie and Oeno islands, is set out in the Pitcairn Constitution Order 2010, SI 2010/244, Sch 2. SI 1970/1434, SI 2000/1341 replaced: SI 2010/244.

(x) St Helena and its Dependencies

862. St Helena and its dependencies.

The colony of St Helena was acquired by settlement under royal charter in 1659. By the Government of India Act 1833[1] it was vested in the Crown to be governed by Order in Council; the Constitution of 2009, which is to come into force as from the appointed day[2], is contained in an Order in Council[3] made, as to the colony itself, by virtue of the Act of 1833.

As far as Ascension and Tristan da Cunha are concerned, the Constitution Order of 2009[4] is made in part by virtue of the British Settlements Acts 1887 and 1945. Ascension was acquired by settlement in 1815 but not made a dependency of St Helena until 1922, while Tristan da Cunha[5] was acquired by settlement in 1816 but not made a dependency of St Helena until 1938[6]. As from the appointed day[7], the territory of St Helena and Dependencies is to be called St Helena, Ascension and Tristan da Cunha[8].

The Constitution of 2009 makes provision for the Governor[9] and for an Executive Council and a mainly elected Legislative Council in relation to St Helena[10]. Legislative power over Ascension and Tristan da Cunha is vested in the Governor alone, acting after consultation with the Island Council for the territory in question[11].

There is a Supreme Court of St Helena[12] and a Court of Appeal[13], both of which have jurisdiction in Ascension and Tristan da Cunha[14]. Appeal may be made to the Privy Council from the Court of Appeal on terms similar to those in respect of the Falkland Islands[15].

1 St Helena Act 1833 s 112 (the rest of this Act, otherwise known as the Government of India Act 1833, is repealed).

2 'The appointed day' means such day as may be prescribed by the Governor, acting in his discretion, by proclamation published in the St Helena Government Gazette: St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, s 2.

3 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751. The Constitution is set out in the Schedule, and is to replace the Constitution set out in the St Helena Constitution Order 1988, SI 1988/1842, Sch 1.

4 See note 3.

5 Namely, the Island of Tristan da Cunha, Gough Island, Nightingale Island and Inaccessible Island: St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule s 229.

6 Both dependencies therefore were provided for by 23 & 24 Vict c 121 (West Coast of Africa and Falkland Islands Act) (1860), repealed and replaced by the British Settlements Act 1887. Since the legislature for St Helena is the Governor and Legislative Council, while that for Ascension and Tristan da Cunha is the Governor alone (see the text and note 11), it seems that the latter territories are not 'for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of [the British Settlements Act 1887], of any British possession' (British Settlements Act 1887 s 6) and hence are subject to the British Settlements Acts 1887 and 1945, and also to the St Helena Act 1833.

7 See note 2.

8 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, s 4(a).

9 As to the Governor see the St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule ss 26-33 (St Helena), ss 143-147 (Ascension), ss 208-212 (Tristan da Cunha).

10 See the St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule ss 34-79.

11 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule ss 151, 216.

12 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule s 82. The Supreme Court may sit either in or outside St Helena: Schedule s 83(1).

13 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule s 86.

14 St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751, Schedule ss 153, 218.

15 See the St Helena Court of Appeal (Appeal to Privy Council) Order 1964, SI 1964/1846 (partially revoked by SI 2009/224). See further PARA 858. Note that the appealable amount in respect of St Helena is £1,000: St Helena Court of Appeal (Appeal to Privy Council) Order 1964, SI 1964/1846, s 3 (amended by SI 1990/991; partially revoked).

UPDATE

862 St Helena[, Ascension and Tristan da Cunha]

TEXT AND NOTES 2, 7--Appointed day is 14 November 2009: see SI 2009/2744; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 44 NOTE 1.

NOTE 15--Appealable amount in respect of St Helena now £5,000: SI 1964/1846 art 3 (amended by SI 2009/3204).

(xi) South Georgia and South Sandwich Islands

863. South Georgia and South Sandwich Islands.

The territories of South Georgia and South Sandwich Islands were acquired by the Crown by annexation and settlement dating from the late eighteenth and early nineteenth centuries, and were established as dependencies of the Falkland Islands in 1908 by Letters Patent[1]. As from the commencement of the 1985 Constitution of the Falkland Islands (now superseded) on 3 October 1985, the territories ceased to be so governed and became known as South Georgia and the South Sandwich Islands[2]. They are under the government of a Commissioner for the Territories[3]. Subject to disallowance by Her Majesty[4], the Commissioner may legislate by ordinance for the peace, order and good government of the territories[5]. He may constitute, appoint to and dismiss from offices to be held at Her Majesty's pleasure[6]. In the exercise of his powers and functions in relation to defence and internal security (excepting the police), he must act in accordance with any advice of the officer commanding Her Majesty's forces in the South Atlantic[7]. He is empowered to establish a Supreme Court and other courts, including a Court of Appeal, and to confer jurisdiction in respect of the territories on a court of justice established in another colony[8].

1 Letters Patent dated 21 July 1908 (SR & O Rev 1948 VII p 583); extended by Letters Patent dated 28 March 1917 (SR & O Rev 1948 VII p 585); and amended by the Falkland Islands Letters Patent 1962 dated 2 April 1962 (SI 1962 I p 1039). All these instruments are now revoked. The 1962 Letters Patent excluded from the dependencies all the islands and territories constituted as the British Antarctic Territory by the British Antarctic Territory Order in Council 1962, SI 1962/400 (see PARA 855), leaving South Georgia and the South Sandwich Islands as the remaining dependencies.

2 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 3. As to the government of the territory see *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*[2005] UKHL 57, [2006] 1 AC 529, [2006] 3 All ER 111, [2006] 3 LRC 377, as qualified by *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[2008] UKHL 61 at [47], [2008] 4 All ER 1055 at [47], [2008] 3 WLR 955 at [47], [2008] 5 LRC 769 at [47] (see also *R (on the application of Barclay) v Secretary of State for Justice and the Lord Chancellor*[2008] EWCA Civ 1319 at [106], [2009] 2 WLR 1205 at [106], [2008] All ER (D) 32 (Dec)); see also PARA 717.

3 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 4 (substituted by SI 1995/1621).

4 See the South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 10.

5 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 9, Annex. As to reservation see Annex para 6.

6 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 7.

7 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 5(2). Before exercising any function which might in his opinion affect the Falkland Islands, he must consult the Executive Council of the Falkland Islands and take account of the views it may express: s 5(3).

8 South Georgia and South Sandwich Islands Order 1985, SI 1985/449, s 13(1), (2). These courts may sit in the territories or elsewhere: s 13(3). The Falkland Islands Courts (Overseas Jurisdiction) Order 1989, SI 1989/2399, confers on the courts of the Falkland Islands jurisdiction to deal with civil and criminal proceedings in respect of matters arising under the law of South Georgia and the South Sandwich Islands. As to appeals to the Privy Council see the South Georgia and South Sandwich Islands (Appeals to Privy Council) Order 1985, SI 1985/450 (partially revoked by SI 2009/224).

UPDATE

863 South Georgia and South Sandwich Islands

NOTE 2--*Bancoult*, cited, reported at [1009] 1 AC 453. *Barclay*, cited, affirmed: [2009] UKSC 9, [2009] 3 WLR 1270, [2009] All ER (D) 15 (Dec).

NOTE 8--SI 1989/2399 amended: SI 2009/1737.

(xii) Sovereign Base Areas of Akrotiri and Dhekelia

864. Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus.

The Sovereign Base Areas of Akrotiri and Dhekelia consist of those portions[1] of the colony of Cyprus that were not established by the Cyprus Act 1960 as the independent sovereign Republic of Cyprus and remain within Her Majesty's sovereignty and jurisdiction[2]. They are to be regarded, therefore, as constituting a colony acquired by conquest or cession as from 5 November 1914[3]. The Crown retains its constituent and legislative power under the prerogative; the Constitution of 1960[4] is made by virtue partly of the prerogative and partly of the power of Her Majesty under the Cyprus Act 1960 to make any laws (and provisions for the making of laws) relating to persons or things either within or outside the areas, which seem requisite for giving effect to arrangements with the authorities of the Republic of Cyprus[5].

There is a Judge's Court, and a Senior Judge's Court (consisting of a Senior Judge and two deputy Senior Judges) from which appeal lies to the Privy Council in the usual classes of case[6].

1 The areas were determined by commissioners whose demarcation is given effect, under the Cyprus Act 1960 s 2(3), by the Sovereign Base Areas of Akrotiri and Dhekelia (Boundaries) Order in Council 1962, SI 1962/396.

2 Cyprus Act 1960 s 2(1)(a). As to the Republic of Cyprus see PARA 748.

3 See PARA 748.

4 Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960, SI 1960/1369; Royal Instructions dated 3 August 1960 (SI 1960 III p 4213).

5 See the Cyprus Act 1960 s 2(1)(b). The Administrator has power to make laws for the peace, order and good government of the Sovereign Base Areas, and the powers of a Governor for the purposes of the Emergency Powers Order in Council 1939 dated 9 March 1939 (SI 1952 I p 621) (see PARA 819): see the Emergency Powers (Amendment) Order in Council 1963, SI 1963/88, s 2(1).

6 Sovereign Base Areas of Akrotiri and Dhekelia (Appeals to Privy Council) Order in Council 1961, SI 1961/59, ss 3, 22 (partially revoked by SI 2009/224). As to the usual classes see PARA 858. Note that the appealable amount in respect of the Sovereign Base Areas is £500: see the Sovereign Base Areas of Akrotiri and Dhekelia (Appeals to Privy Council) Order in Council 1961, SI 1961/59, s 3.

(xiii) Turks and Caicos Islands

865. Turks and Caicos Islands.

The colony of the Turks and Caicos Islands was acquired by settlement toward the end of the seventeenth century. Between 1799 and 1848 the Islands were under the government of the Bahama Islands; from 1848 to 1873 they were governed separately by a President and Legislative Council[1]; from 1873 to 1959 they were a part of Jamaica[2] and from 1959 to 1962 they were a separate part of the Federation of the West Indies. The Constitution of 2006 is made by Order in Council[3] under the West Indies Act 1962; provision is made under that Act to vary or revoke the Constitution[4], and a general power of legislating for the colony is reserved to Her Majesty in Council[5].

The Constitution provides for fundamental rights and freedoms. It also provides for the Governor with reserved powers of legislation[6], for a House of Assembly of elected and appointed members, and for a Cabinet and Ministers appointed from among the members of the House, as well as for a Judicial Service Commission, a Public Service Commission, and a Complaints Commissioner[7].

There is a Supreme Court and a Court of Appeal. Appeal lies to the Privy Council from the Court of Appeal in the usual classes of case[8].

1 The Crown therefore has no general constituent or legislative power under the prerogative: see PARA 807.

2 Hence the Turks and Caicos Islands is not a British settlement for the purposes of the British Settlements Act 1887: see s 6; and PARA 807. As part of Jamaica, the Islands entered the Federation of the West Indies in 1957.

3 See the Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2.

4 West Indies Act 1962 s 7(2).

5 West Indies Act 1962 s 5(1); Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, s 10.

6 Turks and Caicos Islands Constitution Order 2006, SI 2006/1913, Sch 2 s 68. See also the Turks and Caicos Islands Royal Instructions 1988 dated 26 February 1988 (SI 1988 I p 1836).

7 The Turks and Caicos Islands Constitution (Interim Amendment) Order 2009, SI 2009/701, suspends the main constitutional provisions relating to ministerial government and the House of Assembly, and makes temporary provision for government of the territory by the Governor, who may consult with an Advisory Council and a Consultative Council established by the Order. The Order comes into force on such day as the Governor, acting in his discretion, may appoint by proclamation published in the Gazette, and different days may be appointed for the coming into force of different provisions (s 1(3) (substituted by SI 2009/1755)); it is to expire after two years unless continued in force or earlier revoked by a further Order in Council (Turks and Caicos Islands Constitution (Interim Amendment) Order 2009, SI 2009/701, s 3).

8 See the Turks and Caicos Islands (Appeal to Privy Council) Order 1965, SI 1965/1863 (partially revoked by SI 2009/224). As to the usual classes see PARA 858. Note that the appealable amount in respect of the Turks and Caicos Islands is £300: Turks and Caicos Islands (Appeal to Privy Council) Order 1965, SI 1965/1863, s 3 (partially revoked).

(xiv) Virgin Islands

866. Virgin Islands.

The colony of the Virgin Islands[1] was acquired by settlement in the late seventeenth century. A legislative assembly was summoned in 1773[2]. In its essentials, the constitutional history of the colony between 1871 and 1967 was similar to that of Montserrat[3]. The Constitution of 2007 is made by virtue of the West Indies Act 1962 and the prerogative[4]. The Constitution makes provision for fundamental rights and freedoms of the individual and their enforcement; a governor with some reserved powers of legislating[5]; a Premier and ministers who form a cabinet together with the Attorney General; an elected House of Assembly; and a Public Service Commission, a Teaching Service Commission, a Judicial and Legal Services Commission, and a Police Service Commission to provide advice on appointments to offices in these services.

The Constitution continues the existing provisions as to the composition and jurisdiction of the High Court and the Court of Appeal of the Eastern Caribbean Supreme Court[6], and the conditions of appeal to the Privy Council are similar to those for Montserrat[7].

1 As to the extension of the boundaries of the Virgin Islands with effect from 15 August 2007 see the Virgin Islands (Territorial Sea) Order 2007, SI 2007/2141.

2 Hence the Crown has no general constituent or legislative power under the prerogative: see PARA 807; but see also note 4.

3 See PARA 860. The legislative powers of the Virgin Islands were vested entirely in the General Legislature of the Leeward Islands between 1902 and 1953.

4 The Virgin Islands Constitution Order 2007, SI 2007/1678, is expressed to be made by virtue of the West Indies Act 1962 s 5, 7 and of all other enabling powers of Her Majesty. Full power to make laws is reserved to Her Majesty: Virgin Islands Constitution Order 2007, SI 2007/1678, s 119. Her Majesty's constituent power is preserved. See also PARA 807.

5 Virgin Islands Constitution Order 2007, SI 2007/1678, s 81.

6 Virgin Islands Constitution Order 2007, SI 2007/1678, s 89. See the Virgin Islands (Courts) Order 1967, SI 1967/231; the Anguilla, Montserrat and Virgin Islands (Supreme Court) Order 1983, SI 1983/1108; the West Indies Associated States Supreme Court Order 1967, SI 1967/223, s 10 (amended by SI 2000/3060); the Montserrat and Virgin Islands (Supreme Court) Modifications Order 1983, SI 1983/1112; and PARA 860.

7 Virgin Islands (Appeal to Privy Council) Order 1967, SI 1967/234 (partially revoked by SI 2009/224); and see PARA 860.

5. THE EXTENSION OF ENGLISH LAW

(1) INTRODUCTION OF ENGLISH LAW TO CONQUERED OR CEDED COLONIES

867. Continuance of former law in conquered or ceded colonies.

Where a conquered or ceded territory already has, at the time of its acquisition, a set of established laws, those laws will remain in force until altered by the Crown by prerogative or statutory enactment[1]. In particular, full effect will ordinarily be given to local land law[2]. However, any law which is unconscionable[3] or based on religious and ethical principles repugnant to European civilisation will not be given effect or permitted by the courts[4] (though customs of the community such as polygamy or even suicide may be given some recognition, in order to prevent injustice and oppression[5]), and on the automatic abrogation of such repugnant laws justice may be administered according to natural equity[6]. Provisions of the former law which continue but which are inapplicable to the conditions of the colonists will not be applied to them and they may from necessity have to resort to their own jurisprudence[7].

This doctrine of continuation applies subject to the doctrine of act of state[8], and does not apply at all to constitutional questions, at least in so far as these depend on the British concept of the exercise of sovereign authority by the Crown[9]. Nor, of course, can any law continue which is inconsistent with statute law of the United Kingdom expressly or necessarily applying to all colonies or specially to the new colony[10].

Where laws are left in force after acquisition and constitute a non-statutory 'common law' of the territory, they may be changed and developed by a course of judicial decisions[11]; they will also in many instances be overlaid by statutory alteration or codification.

1 *Campbell v Hall* (1774) 20 State Tr 239 at 323; *Memorandum* (1722) 2 P Wms 74, PC; *Forbes v Cochrane* (1824) 2 B & C 448 at 463 per Holroyd J; *Lyons Corpn v East India Co* (1836) 1 Moo Ind App 175 at 271, PC; *R v Jizwa* (1894) 11 SC 387 at 393, Cape of Good Hope SC, per de Villiers CJ. The Crown may exercise its power of alteration by Order in Council, Letters Patent, proclamation or charter under the Great Seal, as well as by United Kingdom or local statute: *Jephson v Riera* (1835) 3 Knapp 130, PC. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 As to the conquered or ceded portions of Canada see *St Catherine's Milling and Lumber Co v R*(1888) 14 App Cas 46 at 55, PC; *A-G for Quebec v A-G for Canada*[1921] 1 AC 401 at 408, PC. As to Southern Rhodesia (now known as Zimbabwe) see *Re Southern Rhodesia*[1919] AC 211 at 233, PC.

3 Eg a law permitting the torture of prisoners or of any other person. See eg the Proclamation dated 1 February 1841 to the Chinese inhabitants of Hong Kong (Rev Laws 1964 App IV A1) (Hong Kong).

4 1 Bl Com (1765 Edn) 105; *Calvin's Case* (1608) 7 Co Rep 1a at 17b; *Dutton v Howell* (1693) Show Parl Cas 24 at 31, HL; *Blankard v Galdy* (1693) 4 Mod Rep 215 at 225a; *Memorandum* (1722) 2 P Wms 74; and see *Fabrigas v Mostyn* (1773) 20 State Tr 175 at 181 per De Grey CJ. See also *R v Picton* (1808) 30 State Tr 805 at 865; and the arguments on the special verdict in *R v Picton* (1810) 30 State Tr 883-955.

5 See eg *Advocate-General of Bengal v Ranee Surnomoye Dossee* (1863) 2 Moo PCC NS 22; *Cheang Thye Phin v Tan Ah Loy*[1920] AC 369, PC; *Khoo Hooi Leong v Khoo Chong Yeok*[1930] AC 346 at 355, PC. Such a custom may be mitigated by usage so as to obtain recognition, but the court cannot itself transform a custom: *Eshugbayi Eleko v Officer Administering the Government of Nigeria*[1931] AC 662 at 673, PC.

6 See *Calvin's Case* (1608) 7 Co Rep 1a at 17b.

7 Eg as to forms of marriage: see *Ruding v Smith* (1821) 2 Hag Con 371 per Lord Stowell. And see *Freeman v Fairlie* (1828) 1 Moo Ind App 305.

8 Rights as against the Crown as the new sovereign power therefore exist only to the extent allowed and recognised by the Crown (the onus of proving such recognition resting on the subject), in as much as the courts have no jurisdiction over or in respect of transactions of the Crown with other sovereigns or acts of the Crown intended as extra-legal manifestations of power in the course of conducting its foreign affairs: *Secretary of State for India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22; *Rajah Salig Ram v Secretary of State for India* [1872] LR Ind App Supp 119, PC; *Cook v Sprigg*[1899] AC 572, PC; *Nireaha Tamaki v Baker*[1901] AC 561 at 576, PC; *West Rand Central Gold Mining Co v R*[1905] 2 KB 391, DC; *Secretary of State for India v Bai Rajbai* (1915) LR 42 Ind App 229 at 237, PC (as to onus of proof); *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357 at 360, 367, PC; *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[1941] AC 308 at 324, [1941] 2 All ER 93 at 98, PC; *Secretary of State for India v Sardar Rustam Khan*[1941] AC 356 at 371, [1941] 2 All ER 606 at 611, PC; *Administration of the Territory of Papua and New Guinea v Guba and Doriga* (1972) 47 ALJR 621 at 656, Aust HC; *Winfat Enterprise (HK) Co Ltd v A-G of Hong Kong*[1985] AC 733, [1985] 3 All ER 17, PC (no municipal court has authority to require the government to give effect to promises of continued recognition of existing private titles of inhabitants of ceded territories). Contrast *Amodu Tijani v Secretary for Southern Nigeria*[1921] 2 AC 399 at 407, 410, PC; *Oyekan v Adele*[1957] 2 All ER 785 at 788, [1957] 1 WLR 876 at 880, PC; cf *Re Southern Rhodesia*[1919] AC 211 at 234, 240, PC; *A-G v Nissan*[1970] AC 179 at 210-211, [1969] 1 All ER 629 at 637, HL, per Lord Reid, at 226 and 649-650 per Lord Pearce, at 232 and 654-655 per Lord Wilberforce, and at 238 and 660 per Lord Pearson.

9 *Kodeeswaran v A-G of Ceylon*[1970] AC 1111 at 1118, PC; *Union Government Minister of Lands v Whittaker's Estate* [1916] App D 203, SA App Div; *Madzimbamuto v Lardner-Burke and George*[1969] 1 AC 645 at 721, [1968] 3 All ER 561 at 572, PC. Cf, as to the Crown's minor prerogatives, *Colonial Government v Laborde* (1902) Mauritius Reports 19, Mauritius SC. See also *Sammut v Strickland*[1938] AC 678 at 697, [1938] 3 All ER 693 at 699, PC; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*[1965] AC 75, [1964] 2 All ER 348, HL.

10 *Campbell v Hall* (1774) 20 State Tr 239.

11 *Kodeeswaran v A-G of Ceylon*[1970] AC 1111 at 1119, 1122, PC.

868. Introduction of English law in conquered or ceded colonies.

Where the law of England has been applied to the conquered or ceded country the effect has been to apply both the common law[1] and the statute law so far as they: (1) were in force, either at the date of the application or at some other specified date; and (2) were not merely in the nature of law of local policy adapted solely to England, but were general regulations equally applicable to any country governed by English law[2]. Statute law thus introduced will not override or prevail against the enactments of the local legislature unless contained in an Act of Parliament which is made applicable to the colony by the express words or necessary intendment of any Act of Parliament[3]. Statutes enacted subsequently to the application of English law have no force in the colony, except in cases in which it is expressly or by necessary implication provided that they are to apply[4].

1 Where provisions for the application of English law refer to 'the principles and rules of common law' in force in England from time to time or at a specified date, the reference is to the whole law of England including English statutory modifications to the principles and rules of common law and equity: *Booth v Booth* (1935) 53 CLR 1 at 30, 32, Aust HC; *Re Johns* [1971-72] P & NGLR 110 at 119, Papua and New Guinea SC.

2 *A-G v Stewart* (1817) 2 Mer 143 at 160.

3 Colonial Laws Validity Act 1865 ss 1-3 (s 1 amended by the Burma Independence Act 1947 Sch 2; the Statute Law (Revision) Act 1976).

4 *R v Vaughan* (1769) 4 Burr 2494.

(2) INTRODUCTION OF ENGLISH LAW TO SETTLED COLONIES

869. Introduction and development of English law in settled colonies.

The common law of England and the statute law existing at the date of the formation of the colony applied to colonies acquired by settlement[1], but statutes subsequently enacted do not apply unless they are expressly applied[2]. This principle of introduction or reception is, however, subject to this restriction, that so much only of the law of England was carried with them by the colonists[3] as was applicable[4] to their situation and the condition of an infant colony[5].

The law of England introduced on settlement is open to local development, for on the one hand, statute law thus introduced will not override or prevail against the enactments of the local legislature unless contained in an Act of Parliament which is made applicable to the colony by the express words or necessary intendment of any Act of Parliament[6], and on the other hand, the common law thus introduced not only is subject to local legislation[7] but also develops by the practice of the courts[8]; such development will not always be uniform with the development of the common law in England[9], unless it is provided that the common law in force is to be that in force in England for the time being rather than as at a specified date.

1 *Memorandum* (1722) 2 P Wms 74; *The Lauderdale Peerage*(1885) 10 App Cas 692 at 744, HL, per Lord Blackburn; *Catterall v Catterall* (1847) 1 Rob Eccl 580; *Countess of Limerick v Earl of Limerick* (1863) 4 Sw & Tr 252; *Falkland Islands Co v R* (1864) 2 Moo PCC NS 266; *R v De Baun* (1901) 3 WALR 1, W Aust; *Walbank v Ellis* (1853) 3 Nfld LR 400 (Newfoundland); *Uniacke v Dickson* (1853) James 287 (Nova Scotia); *Keewatin Power Co v Kenora* (1906) 16 OLR 184 (Ont) (ownership of bed of navigable river); *Penhas v Tan Soo Eng*[1953] AC 304, PC; *R v Wedge* [1976] 1 NSWLR 581, NSW SC. See also *Mabo v Queensland* (1992) 107 ALR 1, 22-25, 58-60, 93, 140-142, Aust HC; *Wik Peoples v Queensland* (1996) 141 ALR 129, [1997] 3 LRC 513, Aust HC. The date on which the law of England is to be ascertained as applying to the settled colony (often called the date of reception) has generally been fixed by local enactment.

2 *Penley v Beacon Assurance Co* (1864) 10 Gr 422 at 428, Upper Canada (Ont) Court of Chancery; *Pitt v Lord Dacre*(1876) 3 ChD 295.

3 The time of introduction may be held to be the date for deciding suitability (particularly, perhaps, in relation to statutes); cf *Quan Yick v Hinds* (1905) 2 CLR 345, Aust HC. But attention has on various occasions been paid, particularly in relation to common law rules and principles, to consideration of the position at the time when the issue of application is raised (more particularly, perhaps, the time of the events giving rise to the litigation); see *Cooper v Stuart*(1889) 14 App Cas 286 at 292, PC; *Nichols v Anglo-Australian Investment, Finance and Land Co* (1890) 11 NSWR 354, NSW SC; *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283 at 291, Aust HC; cf *Sheehy v Edwards, Dunlop & Co* (1897) 13 WN NSW 166, NSW SC.

4 Applicability depends not upon whether the court considers the rule suitable or beneficial for the colony but upon whether it is capable of application in the colony: *State Government Insurance Commission v Trigwell* (1978) 26 ALR 67, Aust HC; *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283 at 310-311, Aust HC. See further note 5.

5 1 Bl Com 107. See, however, *Whicker v Hume* (1858) 7 HL Cas 124 at 161 per Lord Cranworth; *Garrett v Overy* (1968) 69 SR NSW 281, NSW CA. Cf *A-G v Stewart* (1817) 2 Mer 143 at 160 per Grant MR; *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, Aust HC; *Winterbottom v Vardon & Sons* [1921] SASR 364, S Aust SC; *Belilios v Ng Li Shi* (1893) (Hong Kong SC), appended to report of *Re Tse Lai-chiu* [1969] HKLR 159, Hong Kong SC; *Garrett v Overy* (1968) 69 SR NSW 281, NSW CA; *R v Cyr* (1917) 13 Alta LR 320, 38 DLR 601, Alta CA, considering the general condition of public affairs and the attitude of the community on the issue. See also *Meanwell v Meanwell* (1941) 49 Man R 26, [1941] 2 DLR 655, Man CA.

6 Colonial Laws Validity Act 1865 ss 1-3 (s 1 amended by the Burma Independence Act 1947 Sch 2; the Statute Law (Revision) Act 1976); *Phillips v Eyre*(1870) LR 6 QB 1 at 20-21, Ex Ch, per Willes J. As to the legislative competence of the Crown in settled colonies see PARA 807. See also PARA 871.

7 Colonial Laws Validity Act 1865 s 3.

8 See *Kodeeswaran v A-G of Ceylon*[1970] AC 1111 at 1119, 1122, PC.

9 See *Lange v Australian Consolidated Press NZ* [2000] 2 LRC 802, PC; *Lange v Atkinson* [2000] 4 LRC 596, NZ CA; *Invercargill City Council v Hamlin*[1996] AC 624, [1996] 1 All ER 756, [1996] 1 LRC 440, PC; *Australian Consolidated Press Ltd v Uren*[1969] 1 AC 590 at 641, 644, [1967] 3 All ER 523 at 536, 538, PC; *Brisbane City Council v A-G for Queensland*[1979] AC 411, [1978] 3 All ER 30 at 33, PC; *de Lasala v de Lasala*[1980] AC 546, [1979] 2 All ER 1146 at 1152-1153, PC. It has been held that where local enactments use the same terms as English statutes the colonial courts should follow the construction which English courts have put upon those terms: see *Trimble v Hill*(1879) 5 App Cas 342 at 344-345, PC; *Cooray v R*[1953] AC 407 at 419, PC; but contrast *National and Grindlays Bank Ltd v Dharamshi Vallabhji*[1967] 1 AC 207 at 229, [1966] 2 All ER 626 at 636, PC; cf *Nadarajan Chettiar v Walauwa Mahatmee*[1950] AC 481 at 492, PC.

870. Customary, native or indigenous law in settled colonies.

The applicability of native or indigenous law in a settled colony is not automatic, but depends on express enactment or on political concession amounting to a course of practice[1]. Native or indigenous law will only be permitted to continue in existence (if at all) in so far as it is not repugnant to justice and general principles of humanity. Subject to that principle, it may prevail, in the event of inconsistency, over the common law that has been introduced or received into the colony, in as much as common law rules are introduced subject to such qualifications as local circumstances render necessary[2].

1 *Re Ninety-Mile Beach* [1963] NZLR 461 at 468, NZ CA; *Milirrpum v Nabalco Pty Ltd* [1972-73] ALR 65 at 139, 17 FLR 141 at 223, Northern Territory Aust SC. The historic legal doctrine is set aside by *Mabo v Queensland* (1992) 107 ALR 1, [1993] 1 LRC 194, Aust HC, which overrules *Milirrpum v Nabalco Pty Ltd* [1972-73] ALR 65, 17 FLR 141 at least in so far as that case is inconsistent with the propositions: (1) that antecedent rights and interests in land possessed by the indigenous inhabitants at the time of the Crown's acquisition of the territory are not extinguished by that acquisition but continue so as to constitute a burden on the Crown's radical title to all land within the territory; and (2) that the nature and incidents of that native title are to be ascertained, as a matter of fact, by reference to the traditional laws and customs acknowledged and observed by those indigenous inhabitants. As to such native title see also *Te Runanganui o Te Ika Whenua Inc Society v A-G of New Zealand* [1994] 1 LRC 31, NZ CA; *Wik Peoples v Queensland* (1996) 141 ALR 129, [1997] 3 LRC 513, Aust HC.

2 See *Kabaka's Government v Kitonto* [1965] EA 278, East Africa CA; *R v Dabat* [1963] P & NGLR 113 at 114, Papua and New Guinea SC; cf *R v Murrell* (1836) 1 Legge 72, New South Wales SC.

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(3) EXTENSION OF UNITED KINGDOM STATUTES

871. Principles governing extension of United Kingdom enactments.

United Kingdom enactments may 'apply to' or 'extend to' a dependent or other territory as part of the law only of the United Kingdom, in that the operation of the law in the United Kingdom is predicated on some event, circumstance, person or thing identified by relation to that dependent or other territory[1]. Alternatively such enactments may 'apply to' or 'extend to' a dependent territory as part of the law of that territory rather than, or as well as[2], of the law of the United Kingdom. Although this distinction is clearly recognised in law and in legislative practice[3], it is not always drawn terminologically, particularly in older statutes[4]. Some enactments apply and extend in both senses to dependent territories[5].

It is a general principle that legislation of the United Kingdom will not lightly be held to extend to British overseas territories[6], or to the Channel Islands or the Isle of Man[7], as part of their law. Where an Act is so extended by its own terms or by Order in Council or proclamation authorised by the Act, its repeal does not extend to British overseas territories, or to the Channel Islands or the Isle of Man, unless the repealing Act so provides[8].

1 Thus the operation of, eg, the Hong Kong (Extradition) Order 1997, SI 1997/1178 (spent on the repeal of the Extradition Act 1989 by the Extradition Act 2003 s 218(b), Sch 4; for saving provisions see SI 2003/3103), is limited to the United Kingdom, the Channel Islands and the Isle of Man: see art 6.

2 Thus the phrase 'apply for the purposes of' in eg the Extradition Act 2003 (Commencement and Savings) Order 2003, SI 2003/3103, art 5: see PARA 848 note 3.

3 See eg the Statute of Westminster 1931, preamble, s 4. See also the corresponding provisions in many independence Acts, eg the Nigeria Independence Act 1960 s 1(2).

4 Eg in the Foreign Jurisdiction Act 1890 s 5, the term 'extend to' is used in both the senses mentioned in the text; which of these is the relevant sense in any particular instance will depend on the intention of the particular enactment being extended under the Foreign Jurisdiction Act 1890.

5 Eg the Extradition Act 1989 (repealed with savings): see PARA 848.

6 *Al Sabah v Grupo Torras SA*[2005] UKPC 1, [2005] 2 AC 333, [2005] 1 All ER 871, [2005] 3 LRC 771; *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts v Veta Ltd* [2006] UKHL 3 at [1], [2006] 1 All ER 823 at [1], [2006] ICR 250 at [1]; *R (on the application of al-Skeini) v Secretary of State for Defence*[2007] UKHL 26 at [86], [2008] 1 AC 153 at [86], [2007] 3 All ER 685 at [86]; *New Zealand Loan and Mercantile Agency Co v Morrison*[1898] AC 349 at 357, PC; *Re Vocalion (Foreign) Ltd*[1932] 2 Ch 196. See also *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, Aust HC; *Bistricic v Rokov* (1976) 11 ALR 129, Aust HC; *Ukley v Ukley* [1977] VR 121, Vict SC; and the cases cited in PARA 869 note 2.

7 See cases cited in PARA 799 note 10.

8 See *Al Sabah v Grupo Torras SA*[2005] UKPC 1 at [31]-[34], [2005] 2 AC 333 at [31]-[34], [2005] 1 All ER 871 at [31]-[34], [2005] 3 LRC 771 at [31]-[34].

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